













THE  
LEGAL COMPANION,

A MONTHLY LAW JOURNAL,

Containing

IMPORTANT JUDGMENTS OF THE PRIVY COUNCIL AND THE HIGH COURTS OF CALCUTTA,  
MADRAS, BOMBAY, AND ALLAHABAD, SHORT NOTES OF RULINGS REPORTED  
IN THE INDIAN LAW REPORTS (COMPLETE SERIES), LECTURES,  
ESSAYS, REVIEWS, &c.

VOL. VI., 1878.

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EDITED BY

**P. C. Sen**, *Pleader*.

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# CONTENTS.

## VOL VI.

	<i>Page.</i>
stances of the Intrepidity of the Bar, ... ..	1
<b>LAW OF MORTGAGE.</b>	
The Bengal Regulation XVII. of 1806, with Notes,	50
Lecture on Simple Mortgages, by R. B. Ghose, Tagore Law Professor, 1875-76, ... ..	17, 95, 321
<b>PRINCIPLES OF THE INDIAN PENAL CODE.</b>	
General exceptions, ... ..	25, 73, 231
Offences against the State, ... ..	263
Offences relating to the Army and Navy, ... ..	329
Abuse of the Powers of Public Servants, ..	330
Criminal Insanity, ... ..	104
Success Fees, ... ..	131
Law of Pre-emption, ... ..	164
Hindu Joint Family, ... ..	273
Wrong without a Remedy, ... ..	311
Hindu Law of Adoption, ... ..	339
Prisoners, ... ..	350
<b>REVIEWS.</b>	
Indian Law Journal, ... ..	338
Specific Relief Act, by M. C. Mittra, ... ..	116
Index of Indian Law Reports, by Govinda Row, ... ..	353
Chhayet Karjyabidhi, by Barodadas Basu, ... ..	353
Miscellaneous Civil and Criminal Rulings— <i>Reported and Unreported Cases.</i>	
Notes of Rulings contained in the Indian Law Reports.	



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# INDEX.

Court by which decided.	Names of Parties.	Subject of Case.	Pages
Privy Council	Cowasjee Nanabhoy <i>vs.</i> Lallbhoy Vullabhoy and others.	Commission during Agent's Lifetime—Compensation ...	11
Ditto	Girdhari Singh <i>vs.</i> Hurdeo Narain Singh.	Waiver of Irregularity by Judgment-debtor—Act VIII of 1859, ss. 256, 257 ...	19
Calcutta High Court.	Deen Doyal Lall <i>vs.</i> Het Narain Singh.	Mortgage-Bond—Rate of Interest after due date ...	3
Madras High Court.	Case No. 1 of 1876 ...	Conveyance—Non-liability to additional duty as an indemnity-bond ...	2
N. W. P. High Court.	Darsan Singh <i>vs.</i> Hanwanta.	Registration—Bond of Rs. 99 ...	1
Bombay High Court.	Muktum Valad Mohidin <i>vs.</i> Imam Valad Mohidin.	Res-Judicata. ..	27

# GENERAL INDEX.

## VOL VI.

### A

	<i>Page.</i>
ABUSE of Private Nuisance without any violence or unnecessary force and without any breach of the peace is no offence, ...	153
ACCEPTANCE of Present by a Public Servant, not as a motive or reward for any of the objects described in s. 161 of the Indian Penal Code, but as <i>dustoori</i> , is an offence punishable under s. 165, of that Code, ...	243
ACCOMMODATION acceptor, ...	285
ACCOUNTS stated in Art. 62 of the Limitation Act, is not meant an account settled and signed by the party to be held liable, but simply an account which is stated, ...	16
ACCOUNT of Profits obtained by the infringement of an exclusive privilege, ...	85
ACCOUNT in a suit for Redemption, ...	44
ACCOUNTANT, Village, ...	40
ACKNOWLEDGMENT of subsisting right, ...	43
ACQUIESCENCE, ...	149
ACQUISITION— <i>See Right of Occupancy.</i>	
ACQUITTAI by Jury, conviction by High Court, ...	287
ACTS :—	
1835—VI., ...	147
1843—XIX., ...	47
1850—IX., ...	42
1856—XXI., s. 49, ...	89
1858—XXXV., s. 9, ...	291
XL, s. 18, ...	66
1859—VIII., s. 2, ...	66, 84, 145, 257
<i>See Res Judicata.</i>	
"    "    s. 5, ...	44
"    "    ss. 26 and 32, ...	148
"    "    ss. 29, 31, 36, ...	150
"    "    s. 73, ...	39
"    "    s. 139, ...	292
"    "    s. 148, ...	93
"    "    s. 200, ...	294
"    "    ss. 273—281, ...	288
"    XIII. ...	148
"    XIV, ...	148, 287
"    "    s. 1. cl. 15, ...	43
"    "    ss. 20, 31, ...	145
"    "    XV, s. 23, ...	85
1860—XLV., s. 23, ...	153
"    "    s. 65, ...	152
"    "    s. 79, ...	240
"    "    ss. 161, 165, ...	243
"    "    s. 186, ...	240
"    "    s. 188, ...	246
"    "    s. 211, ...	243, 248
"    "    s. 217, ...	150
"    "    s. 441, ...	246



# INDEX.

iii

	<i>Page.</i>
ANCESTRAL Estate—son's interest in—Mitakshara, ...	83
"    Joint and Undivided property, ...	87
"    trade—minor's liability for debts on account of, ...	254
ANCIENT Lights—obstruction, ...	149
APPEAL does not lie from the order of a Judge directing a prosecution under s. 41 of the Presidency Magistrate's Act, ...	38
APPEAL.—Petition of appeal in a Criminal case may be presented to the Appellate Court by any person authorized by the Appellant to present it, ...	249
APPEALS from orders in the execution of a decree, ...	297
APPLICATION for Probate of Will, ...	251
ARMY—offences relating to, ...	329
ATTORNEY—Readmission to Rolls, ...	92
AUCTION-PURCHASER, right of, subject to lease, ...	87

## B

BALANCE order, ...	86
BAR, instances of the intrepidity of the, ...	1
BARRED debt—The Administrator-General of Madras is authorized to pay a barred debt, ...	85
BENGAL Act VIII. of 1869, s. 29, ...	85
"    Civil Courts' Act, s. 24—Muhamedan Law—Conjugal Rights, ...	293
"    Regulation XVII. of 1806, ...	50
BOMBAY Court of Small Causes, ...	42
BURDEN of proof in a suit for setting aside an alienation by father—Mitakshara, ...	83

## C

CAUSE of Action, ...	41, 86, 88, 148
CAUSING a Diminution of Water-supply, ...	40
CESSES, ...	88
CHARGE, ...	150
"    against immoveable property, ...	87
CIVIL Court, ...	150
"    Procedure Code, ...	39, 292, 294
( <i>See Act VIII. of 1859</i> )	
CLAIM, ...	39, 41
CLIENT, ...	45
COLLECTION of salt earth, ...	86
COMMISSION sale, ...	146
COMPANY, ...	86
CONDITIONAL sale, ...	294
CONFESSION, ...	313
CONFISCATION, ...	89
CONJUGAL Rights, ...	293
CONSIDERATION, ...	80, 292, 293
CONSTRUCTION, ...	280, 288
CONTRACT, ...	40, 148
"    Act, ss. 23, 25, ...	292
"    "    s. 127, ill. c., ...	293
CONTRIBUTORY, ...	86
CONTRIBUTION, ...	151
CONVICTION, ...	148
CO-SHAREES, ...	39, 85
ORIGINAL Insanity, ...	104
"    Procedure Code (Act X. of 1872) s. 46, ...	148
"    "    "    "    s. 90, ...	40
"    "    "    "    s. 309, ...	86

			<i>Page.</i>
CUSTOM immemorial,	...	...	87, 150
„ proof of,	...	...	87
<b>D</b>			
DAMAGES,	...	...	85, 149
DECREE,	...	...	145, 151, 297
DEED of Assignment of Mortgage,	...	...	80
DEFINITION,	...	...	40
DELAY,	...	...	149
DELEGATION,	...	...	147
DEMAND,	...	...	287
DEMOLITION,	...	...	149
DESCRIPTION,	...	...	86
DESHMUKH,	...	...	83
DIRECTION,	...	...	40
DISCHARGE of surety,	...	...	285
„ from arrest,	...	...	288
DISMISSAL,	...	...	93
Do. <i>Vide Adjournment.</i>			
DISTRIBUTION,	...	...	41
DOCUMENTARY evidence,...	...	...	87
DOWER,	...	...	293, 295
<b>E</b>			
EJECTMENT,	...	...	150
ENHANCEMENT of rent,	...	...	39, 85, 260
EQUITABLE Mortgage,	...	...	285
EVIDENCE,	...	...	86
„ Act,	...	...	88, 285
„ parcel,	...	...	87, 88
„ documentary,	...	...	87
„ Partition,	...	...	87
EXCLUSIVE privilege,	...	...	85
EXECUTION—(See <i>Mitakshara</i> ).			
„ Proceedings,	...	...	38
„ of decree,	...	...	145, 151, 288, 294
„ „ appeals from orders in,	...	...	297
EX-PROPRIETARY tenant,	...	...	150
<b>F</b>			
FALSE charge,	...	...	248, 243
FERRY,	...	...	246
FEUDAL system,	...	...	87
FINAL decree of Appellate Court,	...	...	295
FORECLOSURE,	...	...	294
FORFEITURE,	...	...	294
FORM of suit,	...	...	42
<b>G</b>			
GIFT,	...	...	43
GOODS,	...	...	148
GOSAVIS,	...	...	150
GRATIFICATION, illegal,	...	...	243
GUARDIAN,	...	...	43

# INDEX.

v

## H

	Page.
HIGH Court,	... 39, 147
HINDU Family,	... 43
„ Joint Family.	... 273
„ lady,	... 148
„ Law,	... 40, 43, 83, 87, 150, 286, 294, 284
„ Widow,	... 40, 151, 268, 294, 251
HOLDER,—See <i>Right of Occupancy</i> .	

## I

IJARADAR,	... 39
ILLEGITIMACY,	... 150, 287
ILLEGAL gratification,	... 243
IMMEMORIAL custom,	... 87
IMMORAL consideration,	... 292
IMMOVEABLE property,	... 87
IMPRISONMENT for debt,	... 288
INDIAN Law Journal,	... 338
„ Penal Code, s. 160,	... 86, 329
„ Succession Act, See Act X. of 1865.	
INJUNCTION,	... 149
INSOLVENCY,	... 146
INTERVENER—See <i>Res-judicata</i> .	
INTERPRETATION of statutes,	... 145
INTREPIDITY of the Bar,	... 1
ISSUES, trial and determination,	... 292

## J

JOINDER of Causes of Action,	... 88
JOINT and undivided Ancestral Property,	... 87
„ Estate—See <i>Mitakshara</i> .	
„ Possession,	... 153
JUDGMENT Creditor,	... 288
„ Debtor,	... 288
JURISDICTION,	... 39, 42, 44, 83, 147, 148, 150

## K

KABULET,	... 260
----------	---------

## L

LARGE estates,	... 190
LEASE, ...	... 87
LEAVE to amend summons,	... 42
LEGALITY of sentence,	... 86
LETTERS Patent of 1865, section 16,	... 297
LIABILITY,	... 41, 236
IMITATION—See <i>Account</i> ,	... 38, 40, 41, 43, 84, 85, 145, 286, 287, 296
LIST of contributories,	... 86
LOSS; wrongful,	... 163
LUNATIC,	... 291

## M

MADRAS Regulation I. of 1805, s. 18,	... 86
MAINTENANCE,	... 150, 268, 287

				Page.
MANDATORY Injunction,	...	...	...	149
MANNORIAL dues,	...	...	...	87
MARRIED Woman,	...	...	...	41
MESNE Profits,	...	...	...	150
MISCHIEF,	...	...	...	153
MINOR,	...	...	...	43, 254
MISJOINDER,	...	...	...	151
MITAKSHARA,	...	...	...	31, 83
MONEY-decree,	...	...	...	81
MORTGAGE,	17, 43, 44, 47, 50, 66, 95, 151, 152, 285, 294,	...	...	321
MOTHER, share of,	...	...	...	286
MUHAMMADAN Law,	...	...	...	293, 295
MUNICIPAL Commissioners,	...	...	...	236
N				
NAVY, offences relating to,	...	...	...	329
NONJOINDER of Parties,	...	...	...	85, 151
NORTH-WESTERN Provinces Land Revenue Act, ss. 194, 195,	...	...	...	291
NOTICE,	...	...	...	149
NUISANCE,	...	...	...	153
O				
OBLIGATION to payment,	...	...	...	84
OBSTRUCTION,	...	...	...	149
OBSTRUCTING a Public Officer,	...	...	...	240
OCCUPANCY— <i>See Right of Occupancy.</i>	...	...	...	
OFFENCES relating to Army and Navy,	...	...	...	329
ONUS Probandi.	...	...	...	43
ORDER and disposition,	...	...	...	146
„ of 1st Class Magistrate,	...	...	...	148
„ of Revenue Officer,	...	...	...	148
P				
PAROL evidence,	...	...	...	87, 88
Parsis,	...	...	...	41
Parsi Succession Act—( <i>See Act XXI. of 1856, s. 8.</i> )	...	...	...	
Particular Act, decree for performance of,	...	...	...	294
Parties, non-joinder of,	...	...	...	85
Partition,	...	...	...	87, 286
Payment— <i>See Voluntary Payment,</i>	...	...	...	40, 85, 84
PENAL Code,	40, 25, 73, 153, 236, 240, 243, 246,	...	...	248
Pensions Act, 1871,	...	...	...	83
Performance of particular act, decree for,	...	...	...	294
Plaint, rejection of,	...	...	...	151
Plea of limitation,	...	...	...	148
Pleader,	...	...	...	45, 139
• <i>Vide Professional Misconduct.</i>	...	...	...	
Power of delegation,	...	...	...	147
Practice,	...	...	...	42
Pre-emption,	...	...	...	151, 197, 195
Presentation of Criminal Appeal,	...	...	...	249
Presidency Magistrates' Act,	...	...	...	38
Principal and surety,	...	...	...	285
Principles of the Penal Code,	...	...	...	25, 73, 263, 329
Procedure,	...	...	...	288, 250, 297
Proceedings,	...	...	...	297

# INDEX.

vii

	Page.
Process fees,	131
Professional assistance,	149
"    misconduct,	139
Profits,	87, 85
Proof, burden of,	83
Prosecution,	38
Public Servants, abuse of Powers,	330
Purchaser— <i>See Mitakshara.</i>	

## Q

Question of title,	39, 251
--------------------	---------

## R

Receipt, unregistered,	88
Redemption of mortgage,	43, 44, 151
Reference,	148
Registration Act,	88, 47, 80, 284
Regulation VII. of 1825,	44
"    I. of 1805, Madras, s. 18,	86
"    XVII. of 1806, Bengal,	50, 294
Rejection of Pleint,	151
Remedy,	311
Rent, enhancement of,	39, 85
"    suit for,	257
Res Judicata,	22, 47, 84, 145, 257, 292
Retrospective enactment,	288
Revenue Court,	150
Reversioner,	294
Right of Occupancy,	15
"    of Purchaser— <i>See Mitakshara.</i>	
"    to Free Pasturage,	87
Rioting,	153
Rival Decrees,	151
Rolls, Attorney re-admitted to,	92

## S

Sale—( <i>See Mitakshara</i> ),	77, 150, 294
Saltearth,	86
Sentence,	86
Separate Property,	41
Share—( <i>See Mitakshara</i> ),	87, 286
Simple mortgage,	17, 321
Sirland,	150, 152
Small Cause Court,	39, 88
"    Parcels of land,	190
Son's interest,	83
Special Appeal,	39, 295
Specific Performance,	40
"    Relief Act,	116
"    sum,	84
State, offences against the,	263
Statute of distribution,	41
Statutes,	146, 147, 145
Stridhun,	148
Succession,	150
Sudras,	101, 287
Summary trial,	89



			<i>Page.</i>
Suit,	...	...	287
" for possession,	...	...	42
" barred by limitation,	...	...	85
" for enhancement,	...	...	84, 260
" " specific sum of money,	...	...	84
" " contribution,	...	...	151
" " setting aside Mortgage Deed,	...	...	150
" " Kabuleut,	...	...	260
" " Rent,	...	...	257
Surety bond,	...	...	293
Surety,	...	...	285
<b>T</b>			
Talabda Koli Caste,	...	...	40
Title, questions of.	...	...	39, 286
" to immoveable property,	...	...	42
Trespasser,	...	...	150
Trial and determination of issues,	...	...	292
Trust deed,	...	...	285
<b>U</b>			
Undivided Hindu Family,	...	...	43
Unregistered Receipt,	...	...	88
<b>V</b>			
Vagueness in charge,	...	...	150
Valuation,	...	...	150
Vicinage,	...	...	190
Village Accountant,	...	...	40
" Munsif's Peon,	...	...	40
Void Agreement,	...	...	292
" Contract,	...	...	253
Voluntary Payment,	...	...	12
<b>W</b>			
Wajib-ul-arz,	...	...	151
Widow,	...	...	251, 40
Will,	...	...	148
Wrongs,	...	...	311
Wrongful Loss,	...	...	153

THE  
LEGAL COMPANION.

HIGH COURT, N.-W. P.

*The 11th August 1876.*

PRESENT :

Sir Robert Stuart, *Kt.*, Chief Justice, and Mr. Justice Turner.

DARSHAN SINGH\* and others (Defendants) *Appellants*,

*versus*

HANWANTA (Plaintiff) *Respondent*.

*Act VIII of 1871 (Registration Act), s. 17, cl. (2)—Registration—Mortgage.*

A bond which charges immovable property with the payment on a day specified therein of Rs. 99, the principal amount, and Rs. 6, interest thereon, should be registered under the provisions of cl. (2), s. 17, Act VIII of 1871.

JUDGMENT.—Assuming that the instrument creates a charge on immovable property, which may be doubted, it purports to create an interest over Rs. 100 in value, for it secured the repayment of Rs. 99 *plus* Rs. 6, the interest for three months. This was the least sum that could have been recovered under the instrument. The instrument not having been registered we cannot act upon it. Nor can we decree the debt apart from the lien, for the agreement should have been but was not registered, and more than four years had elapsed prior to suit from the date on which the agreement to repay the money was broken. This claim was therefore barred by limitation. The appeal is decreed, and, the decree of the Lower Appellate Court being reversed, the decree of the Court of first instance is restored with costs.

\* *Vide* I. L. R. 1. All. p. 274.

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MADRAS HIGH COURT.*The 15th August 1876.*

PRESENT :

Sir W. Morgan, C. J., Mr. Justice Holloway, and Mr. Justice Innes.

Case No. 1\* of 1876.

*Stamp Act, XVIII of 1869—Conveyance—Non-liability to  
additional duty as an indemnity—bond.*

Where a document, purporting to be a conveyance, and for only one consideration, contains words which merely express, though very informally, the usual covenants, for title which every properly drawn English conveyance contains, those words cannot be considered as constituting an indemnity bond, so as to render the document liable to stamp duty as an indemnity bond in addition to the stamp duty to which it is liable as a conveyance.

This was a case referred for the decision of the High Court under s. 41, Act XVIII of 1869, by the Board of Revenue in their Proceedings, dated 19th June 1876, No. 1,587.

The Court delivered the following

JUDGMENT.—We are of opinion that the document is liable to the stamp upon a conveyance only. The words supposed to constitute an indemnity bond are merely a very informal expression of the covenants for title which every properly drawn English conveyance contains.

The stamp for a conveyance covers these words because they are a well understood part of it.

S. 14 shows that a stamp, for each category, upon a document falling within two distinct categories, is required only where there is what is called a distinct consideration. Here there is unity of consideration, and the document, with the contractual words, fulfils the definition of a conveyance, and without them would not.

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\* *Fide* I. L. R. I. Madras p. 133.

## CALCUTTA HIGH COURT:

*The 20th March 1876.*

## PRESENT:

Mr. Justice Kemp and Mr. Justice Birch.

DEEN DOYAL LALL\* (Plaintiff) *Appellant*,*versus*HET NARAIN SINGH and others (Defendants) *Respondents*.*Mortgage Bond—Interest after due date, Rate of.*

In a suit brought to recover the principal and interest due upon a written security given for the payment of the principal money on a day specified, with interest at a stipulated rate up to such day, the Court may, in its discretion, award interest on the principal sum from due date at such rate as it thinks fit, and is not bound to award such interest at the stipulated rate.

KEMP, J.—The plaintiff is the appellant in this case. He sued three sets of defendants to recover a sum of Rs. 8,088-8-6, due under a bond dated the 28th of Assin 1269 Fuslee, corresponding with the 17th of October 1861. The principal amount borrowed was Rs. 2,600, and interest is claimed from the 28th Assin 1269, the date of the bond, to the 28th Bysack 1281, date of suit, being twelve years and seven months, at the rate of Re. 1-8 per mensem. The total amount of interest claimed being Rs. 5,488-8-6. The bond was admitted by the principal defendants, the judgment-debtors. They were examined, and they also stated that, after the bond fell due, they were unable to pay it, and that they agreed to go on paying interest. The first defendants, are the purchasers of a portion of the property which was mortgaged to the plaintiff as security for the sum advanced by him to the principal defendants. The Subordinate Judge has given the plaintiff a modified decree for a sum of Rs. 2,875-9-6 out of Rs. 8,088-8-6 claimed. He has also made the plaintiff pay the costs of the defendants, and the result of the suit is, that although the bond is admitted, and the defendants depose that they were unable to pay, and asked for time, and promised to pay interest, they have to pay only about one-third of the amount claimed, and that the plaintiff has only to receive Rs. 2-5 in the shape of costs from the defendants. No wonder that, under these circumstances, the respondents did not appeal to this Court.

\* *Vide* I. L. R. 2. Calcutta p. 41.

The Subordinate Judge has found that, as there is no stipulation in the bond regarding payment of interest after the appointed period for the discharge of the debt, the plaintiff is not entitled to interest after the lapse of that period. . . . The first objection taken before us by the appellant is, that the Court was wrong in not using its discretion, in overlooking the evidence of the debtor-defendants, and in not awarding interest from the date upon which the bond fell due up to the date of suit. The purchaser-defendants raised the following objection, that interest after the due date is not a charge upon the property hypothecated, inasmuch as any interest after that date is in the nature of damages, and more than six years having elapsed from the date on which the principal fell due, namely, in May 1862, the suit is barred.

We think that the Subordinate Judge is clearly wrong in not awarding interest at all from the date on which the bond fell due. The execution of the bond is admitted, and the bond-debtors admit in their evidence that they were unable to pay the debt on the date it fell due, and that they promised to pay interest from time to time. There is a case before the House of Lords, of *Cook v. Fowler* (1), in which it has been held that there is no rule of law that upon a contract for the payment of money on a day certain with interest at a fixed rate down to that day a further contract for the continuance of the same rate of interest is to be implied. . . . Lord Selborne, in his judgment, which is to be found at page 37, says:—"Although in cases of this class, interest for the delay of payment *post diem*, ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract. The rate of interest to which the parties have agreed during the term of their contract may well be adopted, in an ordinary case of this kind, by a Court or jury, as the proper measure of damages for the subsequent delay; but that is because ordinarily a reasonable and usual rate of interest, which it may be presumed would have been the same whatever might be the duration of the loan, has been agreed to. But in the case before your Lordships, the agreed rate of interest is excessive and extraordinary; and although no question is raised between the present parties as to its fairness and reasonableness so far as it was matter of express contract, it by no means follows that it would have been fair and reasonable, or would have been so regarded by

the borrower, if it had been indefinitely extended to every possible delay of payment after the stipulated time."

Now, applying the principle thus laid down to the present case, we do not think we should be justified in giving the plaintiff interest from the date on which the bond fell due at the rate of 18 per cent. per annum, the rate mentioned in the bond ; but we think that, acting upon the discretion vested in us, we ought to allow the plaintiff interest at the rate of 6 per cent. per annum, which is the rate usually allowed by this Court, from the date on which the bond fell due. The plaintiff will therefore be entitled to recover Rs. 2,600 principal with interest at the rate of 18 per cent. per annum up to the date on which the bond fell due, and from that date at the rate of 6 per cent. per annum up to date of payment.

We also think that the decision of the Court below with reference to costs must be modified. We therefore modify the decree of the Court below with reference to our remarks made above as to the interest payable to the plaintiff and the period for which that interest is to be paid, and as regards costs, we think that the plaintiff is entitled to his costs in this Court and in the Court below upon the sum now decreed as against both sets of defendants.

(1) L. R., 7 H. L., 27.

## AN ELEMENTARY COURSE OF LAW LECTURES.

### LECTURE II.

#### *On Succession—Will or Testament.*

A Will or Testament is an instrument by which the devolution of an inheritance is prescribed. Inheritance is a form of universal succession. A universal succession is a succession to a *universitas juris*, or university of rights and duties. Inverting this order we have therefore to inquire what is a *universitas juris* ; what is a universal succession ; what is the form of universal succession which is called an inheritance ? And there are also two further questions, which demand solution. These are, how came an inheritance to be controlled in any case by the testator's volition, and what is the nature of the instrument by which it came to be controlled ?

The first question relates to the *universitas juris* ; that is—a university (or bundle) of rights and duties. A *universitas juris* is

a collection of rights and duties united by the single circumstance of their having belonged at one time to some one person. It is, as it were, the legal clothing of some given individual. It is not formed by grouping together *any* rights and *any* duties. It can only be constituted by taking all the rights and all the duties of a particular person. The tie which so connects a number of rights of property, rights of way, rights to legacies, duties of specific performance, debts, obligations to compensate wrongs—which so connects all these legal privileges and duties together as to constitute them a *universitas juris*, is the *fact* of their having attached to some individual capable of exercising them. Without this *fact* there is no university of rights and duties. The expression *universitas juris* is not classical, but for the notion jurisprudence is exclusively indebted to Roman law; nor is it at all difficult to seize. We must endeavour to collect under one conception the whole set of legal relations in which each one of us stands to the rest of the world. These, whatever be their character and composition, make up together a *universitas juris*; and there is but little danger of mistake in forming the notion, if we are only careful to remember that duties enter into it quite as much as rights. Our duties may over-balance our rights. A man may owe more than he is worth, and therefore if a money value is set on his collective legal relations he may be what is called insolvent. But for all that the entire group of rights and duties which centres in him is not the less a "*juris universitas*."

We come next to a "universal succession." A universal succession is a succession to a *universitas juris*. It occurs when one man is invested with the legal clothing of another, becoming at the same moment subject to all his liabilities and entitled to all his rights. In order that the universal succession may be true and perfect, the devolution must take place *uno ictu*, as the jurists phrase it. It is of course possible to conceive one man acquiring the whole of the rights and duties of another at different periods, as for example by successive purchases; or he might acquire them in different capacities, part as heir, part as purchaser, part as legatee. But though the group of rights and duties thus made up should in fact amount to the whole legal personality of a particular individual, the acquisition would not be a universal succession. In order that there may be a true universal succession, the transmis-

sion must be such as to pass the whole aggregate of rights and duties at the *same* moment and in virtue of the *same* legal capacity in the recipient.

When a Roman citizen *abrogated* a son, *i. e.*, took a man, as his adoptive child, he succeeded *universally* to the adoptive child's estate, *i. e.*, he took all the property and became liable for all the obligations. Several other forms of universal succession appear in the primitive Roman law, but infinitely the most important and the most durable of all was that one with which we are more immediately concerned, *Hæreditas* or Inheritance. Inheritance was a universal succession occurring at a death. The universal successor was *Hæres* or Heir. He stepped at once into all the rights and all the duties of the dead man. He was instantly clothed with his entire legal person, and we need scarcely add that the special character of the *Hæres* remained the same, whether he was named by a Will or whether he took on an intestacy. The term *Hæres* is no more emphatically used of the Intestate than of the Testamentary Heir, for the manner in which a man became *Hæres* had nothing to do with the legal character he sustained. The dead man's universal successor, however he became so, whether by Will or by Intestacy, was his Heir. But the Heir was not necessarily a single person. A group of persons, considered in law as a single unit, might succeed as *Co-heirs* to the Inheritance.

According to the Roman Law, "an inheritance is a succession to the entire legal position of a deceased man." The notion was that, though the physical person of the deceased had perished, his legal personality survived and descended unimpaired on his Heir or Co-heirs, in whom his identity (so far as the law was concerned) was continued.

In modern Testamentary Jurisprudence, as in the later Roman Law, the object of first importance is the execution of the testator's intentions. In the ancient law of Rome the subject of corresponding carefulness was the bestowal of the Universal Succession. One of these rules seems to our eyes a principle dictated by common sense, while the other looks very much like an idle crotchet. Yet that without the second of them the first would never have come into being is as certain as any proposition of the kind can be. In order to understand this clearly, we should notice one peculiarity



invariably distinguishing the infancy of society. Men are regarded and treated not as individuals, but always as members of a particular group. Every body is first a citizen, and then, as a citizen, he is a member of his order—of an aristocracy or a democracy, of an order of patricians or plebians; or, in those societies which an unhappy fate has afflicted with a special perversion in their course of development, of a caste. Next, he is a member of a gens, house, or clan; and lastly, he is a member of his *family*. This last was the narrowest and most personal relation in which he stood; nor, paradoxical as it may seem, was he ever regarded as *himself*, as a distinct individual. His individuality was swallowed up in his family. Primitive society, then, may be said to have for its units, not individuals, but groups of men united by the reality or the fiction of blood-relationship.

It is in the peculiarities of an undeveloped society that we seize the first trace of a Universal Succession. Contrasted with the organisation of a modern state, the commonwealths of primitive times may be fairly described as consisting of a number of little despotic governments, each perfectly distinct from the rest, each absolutely controlled by the prerogative of a single monarch. But though the Patriarch had rights thus extensive, it is impossible to doubt that he lay under an equal amplitude of obligations. If he governed the family, it was for its behoof. If he was lord of its possessions, he held them as trustee for his children and kindred. He had no privilege or position distinct from that conferred on him by his relation to the petty commonwealth which he governed. The Family, in fact, was a Corporation; and he was its representative or, we might almost say, its Public officer. He enjoyed rights and stood under duties, but the rights and the duties were, in the contemplation of his fellow-citizens and in the eye of the law, quite as much those of the collective body as his own. Let us consider for a moment, the effect which would be produced by the death of such a representative. In the eye of the law, in the view of the civil magistrate, the demise of the domestic authority would be a perfectly immaterial event. The person representing the collective body of the family and primarily responsible to municipal jurisdiction would bear a different name, and that would be all. The rights and obligations which attached to the deceased head of the house would attach, without breach of continuity, to his successor; for

in point of fact, they would be the rights and obligations of the family, and the family had the distinctive characteristic of a corporation—that it never died. Creditors would have the same remedies against the new chieftain as against the old, for the liability being that of the still existing family would be absolutely unchanged. All rights available to the family would be as available after the demise of the headship as before it—except that the Corporation would be obliged to *sue* under a slightly modified name.

It seems in truth, that the prolongation of a man's legal existence in his heir, or in a group of co-heirs, is neither more nor less than a characteristic of *the family* transferred by a fiction to the *individual*. Succession in corporations\* is necessarily universal, and the family was a corporation. Corporations never die. The decease of individual members makes no difference to the collective existence of the aggregate body, and does not in any way affect its legal incidents, its faculties or liabilities. Now in the idea of a Roman universal succession all these qualities of a corporation seem to have been transferred to the individual citizen. His physical death is allowed to exercise no effect on the legal position which he filled, apparently on the principle that that position is to be adjusted as closely as possible to the analogies of a family, which, in its corporate character, was not of course liable to physical extinction.

Now in the older theory of Roman law the individual bore to the family precisely the same relation which a Corporation sole bears to a Corporation aggregate. The derivation and association of ideas are exactly the same. In fact, if we say to ourselves that for purposes of Roman Testamentary Jurisprudence each individual citizen was a Corporation sole, we shall not only realise the full conception of an inheritance, but have constantly at command the clue

\* It has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality. These artificial persons are called bodies politic, bodies corporate, or corporations: of which there is a great variety subsisting, for the advancement of religion, of learning, and of commerce; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. The first division of Corporation is into *aggregate* and *sole*. Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue for ever, of which kind are the mayor and commonalty of a city, the head and fellows of a college, &c. Corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation; so is a bishop, &c. Vide 1, Blackstone, Chap. XVIII.

to the assumption in which it originated. It is an axiom that the King never dies, being a Corporation sole. His capacities are instantly filled by his successor, and the continuity of dominion is not deemed to have been interrupted. With the Romans it seemed an equally simple and natural process, to eliminate the fact of death from the devolution of rights and obligations. The testator lived on in his heir or in the group of his co-heirs.

When a Roman citizen died intestate or leaving no valid Will, his descendants or kindred became his heirs. The person or class of persons who succeeded did not simply *represent* the deceased, but, in conformity with the theory just delineated they *continued* his civil life, his legal existence. The same results followed when the order of succession was determined by a Will, but the theory of the identity between the dead man and his heirs was certainly much older than any form of Testament or phase of Testamentary Jurisprudence.

The conception of a universal succession, firmly as it has taken root in jurisprudence, has not occurred spontaneously to the framers of every body of laws. Wherever it is now found, it may be shown to have descended from the Roman law. According to Roman law, the original Will or Testament was an instrument, or (for it was probably not at first in writing) a proceeding, by which the devolution of the *Family* was regulated. It was a mode of declaring who was to have the chieftainship, in succession to the Testator. When Wills are understood to have this for their original object, we see at once how it is that they came to be connected with one of the most curious relics of ancient religion and law, the *sacra* or family rites. These *sacra* were the Roman form of an institution which shows itself wherever society has not wholly shaken itself free from its primitive clothing. They are the sacrifices and ceremonies by which the brotherhood of the family is commemorated, the pledge and the witness of its perpetuity. Whatever be their nature—whether it be true or not that in all cases they are the worship of some mythical ancestor,—they are everywhere employed to attest the sacredness of the family relation; and therefore they acquire prominent significance and importance, whenever the continuous existence of the Family is endangered by a change in the person of its chief. Accordingly, we hear most about them in connection with demises of domestic sovereignty. Among the

Hindoos, the right to inherit a dead man's property is exactly co-extensive with the duty of performing his obsequies. If the rites are not properly performed or not performed by the proper person, no relation is considered as established between the deceased and any body surviving him; the Law of Succession does not apply and no body can inherit the property. Every great event in the life of a Hindoo seems to be regarded as leading up to and bearing upon these solemnities. If he marries, it is to have children who may celebrate them after his death; if he has no children, he lies under the strongest obligation to adopt them from another family, "with a view to the funeral cake, the water, and the solemn sacrifice."

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### PRIVY COUNCIL.

*The 20th and 21st June 1876.*

*On Appeal from Bombay High Court.*

COWASJEE NANABHOY\* (Plaintiff) *Appellant,*  
*versus*

JALLABHOY VULLUBHOY and others (Defendants) *Respondents.*

*Contract—Agency—Sale of the Subject of Agency—Commission during Agent's Lifetime—Compensation.*

By an agreement, dated the 10th of June, 1857, the Appellant and others entered into a partnership for the purpose of establishing a factory for the manufacture of cotton twist; and thereby entrusted the whole management of the said factory to the Appellant during his life. The 4th clause thereof ran as follows "All we shareholders having agreed to make this settlement, that in return for the trouble you have been at in getting up this factory we have appointed you for your life the agent or broker of this factory, as to that it is to be understood as follows. Whatever cotton may have to be purchased for this factory do you purchase; and whatever yarn may be made in this factory all that do you sell; and for whatever you may sell on account of the factory do you duly receive from this company the commission at the rate of 5 per cent. during your lifetime." A decree for dissolution and winding up of the said co-partnership having been obtained by some of the co-partners on the ground that the same could not be carried on profitably; the Appellant contended that he was entitled to compensation in respect of his said engagement.

*Held*, that there being no agreement by the co-partners to renounce their right of dissolution, or to pay compensation if they exercised such right, even if the partnership were originally intended to exist during the Appellant's life, the Appellant was not entitled to compensation.

\* *Vide* 3, Law Reports, Indian Appeals, p 200.

SIR ROBERT P. COLLIER :— The circumstances under which this appeal arises are as follows. .

On the 10th of June, 1857, *Cowasjee Nanabhoy* entered into an agreement with a number of persons, who were to form a partnership with him for the purpose of establishing a factory for the manufacture of cotton twist. As the terms of this agreement are very peculiar, it is as well to read *in extenso* the material parts of it. The beginning of the agreement is to this effect : "To *Parsee Cowasjee Nanabhoy Dawar*, written by us the undersigned, (who) do give in writing to you as follows:—You are establishing a factory for the manufacture of 'water' cotton twist. For the same there have been made 100 allotments, *i. e.*, 100 shares each; one share has been fixed at about Rs.3,000, *viz.*, three thousand. Relative to the same, we have given in writing to you this instrument, agreeably to the particulars written below. The first clause is this:—For the above-mentioned factory (ground is to be procured), and a building is to be erected, and machinery is to be sent for from *Europe*, and the same is to be set up here. In regard thereto, whatever business may have to be transacted, *i. e.*, the employment of persons, and whatever outlays may have to be made for the said factory, the whole management thereof, all we the undersigned shareholders having agreed, have intrusted to you that management, do you duly carry on during your lifetime, and the entire authority for signing and carrying on the entire management of the said factory belongs to you, and after the decease of you, *Cowasjee*, the whole of the shareholders are to approve of such agent or trustee as the shareholders, having held general meeting, may appoint." The second clause runs thus : "Out of the above 100 allotments, *i. e.*, shares as many shares as we have taken we have made known below in writing in the place of the signature of each of us, and at the time of signing this agreement, having paid you a deposit at the rate of Rs.500, *viz.*, 500 for each one share, a receipt bearing your signature was obtained." The third is in these terms : "For the above purpose, whatever may have been expended for a building and machinery. and whatever other outlays may have been made and may hereafter be made, all those we the shareholders are duly to pay in equal portions agreeably to our shares, the calls which you make in respect of the same as there may be need, we are duly to pay

within fifteen days' time. If within the said time of fifteen days we should not pay the amount of each call of those calls which you may make, then the share or shares subscribed by us shall become forfeited, i.e, there shall not remain on the part of those who may not pay the calls any right to the deposit to the amount of Rs. 500, viz, 500 paid per share, and the call or calls which may have been (already) paid, and the money paid for the same shall be credited to the profit account of this company; and hereafter should any shareholder of the shareholders who have signed below sell or make over his share or shares to any individual, the party or parties purchasing the same hereafter is or are also duly to act up to this agreement." The fourth runs thus: "All we shareholders having agreed to make this agreement or settlement (*viz.*), that in return for the trouble you have been at in getting up this factory we have appointed you for your life the agent or broker of this factory, as to that it is to be understood as follows: Whatever cotton may have to be purchased for this factory do you purchase, and whatever yarn may be made in this factory all that do you sell; and for whatever you may sell on account of the factory do you duly receive from this company the commission at the rate of Rs. 5, viz., 5 per cent. during your lifetime, but upon purchases you are not to receive anything from the company; yet on goods which you may purchase from merchants and sell, you yourself having received a percentage, also agreeably to custom, do you duly give credit for the same to this company," and so on. The fifth relates to sending for machinery on behalf of the company, and setting up the machinery, and so forth. The sixth relates to the calling of meetings, and the remaining provisions do not for the present purpose appear to be material.

Cowasjee took a number of shares in the company, some of which he held up to the time of the winding-up. He was undoubtedly a partner with these persons. He called up the full amount which was contemplated by this agreement, namely, Rs. 3,000 on each share, all the shares having been taken. Some time afterwards he called up another Rs. 1,000 on each share, and he also borrowed a sum of Rs. 1,50,000; he borrowed it indeed upon his own credit, but he charged it to the company, and he made another call of Rs. 500 per share. Upon this the shareholders became dissatisfied; meetings were called, and they came to the

conclusion that the company could not be carried on profitably with the capital which had been subscribed, or which they were bound to pay, and under these circumstances they filed a bill, praying, among other things, for a dissolution and winding up of the company. The order for the dissolution was made by the High Court of *Bombay*, and the reasons for making it are stated in the judgment of the High Court, of which it is not necessary to read more than the following passage: "Supposing the partnership to be for a definite period, or one which is not dissoluble at the will of the majority of the members, we are of opinion that a state of things has arisen which requires the Court to decree a dissolution. It is impossible for the business of the company to be carried on without making further calls on the shareholders, the debt is accumulating, and it appears that even with the capital subscribed the business could not be carried on." An appeal was preferred against this judgment to the Queen in Council. The judgment was affirmed by the Queen upon the advice of this Board, but entirely without prejudice to the question whether or not *Cowasjee* was entitled to compensation. Subsequently the High Court of *Bombay* decided that he was not entitled to any compensation, and from this last decision the present appeal is preferred.

This question arises upon the construction of the contract. It is to be observed, as was properly called to their Lordships' attention by the counsel for the Appellants, that this is not a contract between master and servant, nor between principal and agent—at all events, not a contract pure and simple between principal and agent—but it is a contract between a partner and his co-partners. It is further to be observed that the remuneration of *Cowasjee* is not to be by salary, but by a commission upon sales. The distinction between the position of a man who is to be paid by a fixed salary and that of a man who is to be paid by a commission is obvious. The man who is paid by a salary is not necessarily affected by the prosperity or adversity of the company, or even by its dissolution. He may be entitled to his fixed salary whatever may happen. But a man who agrees to be paid by a commission upon sales to a certain extent speculates on the prosperity of the company; the more the company sells the more he gets, the less it sells the less he gets, and if it sells nothing he gets nothing

*This distinction, which indeed is implied by the very terms used, is one which has been recognised in several cases which have come before the Courts.*

The question is, whether from the whole of this agreement it is to be inferred, by necessary or reasonable implication, that all the co-partners of *Cowasjee* bound themselves to carry on the business at all hazards, or at whatever loss, at least during his life, or in other words whether they agreed to renounce their right of dissolving the company if they found that it could not be carried on except at a loss, or whether as an alternative to either of these two cases they agreed to pay him compensation. The part of the agreement which has been most pressed upon their Lordships is that contained in the 4th clause, wherein this is said (and indeed the same expression is used in the first clause), "You are to receive commission for what you sell on our account during your lifetime." Certainly it appears to their Lordships that the effect of this provision would be to give *Cowasjee* a right to commission during his lifetime, provided that the company was carried on and any commission was earned. It may also be contended, though it is not necessary to decide whether correctly or not, that these terms import an agreement that the partnership should be carried on at least as long as *Cowasjee* lived; but that would not be enough for the Appellants, for they would have further to shew that the partners relinquished the inherent right they would possess, notwithstanding that the partnership were established for the life of *Cowasjee*, or even for a definite term, of winding it up, or applying to have it wound up, in the event of its not being able to be carried on with success. This right is stated in Mr. Justice *Lindley's* book on Partnership, at page 243 of the last edition, in which he says: "In a more recent and more important case, however, the Court recognised the fact that expectation of profit is implied in every partnership, and held that if a partnership is entered into for a term of years, and the capital originally agreed to be furnished has been all spent, and some of the partners are unable or unwilling to advance more money, and at the same time the concern cannot go on, except at a loss, unless they do, the partnership will be dissolved by a Court of Equity. Under such circumstances as these it is unimportant whether the concern is already embarrassed or not. After everything has been done which was agreed to be done, and certain loss is the



only result of going on, any partner is entitled to have the concern dissolved, although he may have agreed that the partnership should continue for some definite time, and that time has not yet expired." So even putting it in the light most favourable for *Cowasjee*, that the partnership was originally intended to exist at least during the time of his life, it remains to be shown that there is any provision in this agreement from which it can be fairly inferred that his co-partners relinquished the right which they would have of applying to the Court for winding up the business if it could not be carried on at a profit, or, in the event of their exercising this right, undertook to pay him compensation. In this case the company has been wound up on almost precisely the grounds which are indicated in Mr. Justice *Lindley's* book, and the other for winding up has been affirmed by this tribunal.

Their Lordships, after giving their best attention to the whole of this agreement, have come to the conclusion that by no fair and reasonable intendment can it be inferred that the partners relinquished their right of dissolving or applying to have the company dissolved under the circumstances mentioned, or that they agreed, if they did exercise this right, to pay *Cowasjee* compensation. For this reason they are of opinion that the case of *Cowasjee* fails.

Many cases have been called to their Lordships' attention, decided upon the terms of particular contracts, and more or less bearing upon the present, but inasmuch as the decision of this case rests upon the words of this contract, which is of a very peculiar character, their Lordships do not think it necessary or advantageous to pass those cases in review. They think it enough to say that the conclusion they have come to, that no such term as has been contended for is to be imported into this contract, appears to them in conformity with the current of decisions which have been quoted, and more especially with the last case of *Rhodes v. Forwood*, decided by the House of Lords.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the High Court of Bombay be affirmed, and that this appeal be dismissed with costs.

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## CONVEYANCES.—STAMP AND REGISTRATION.

From January 1825 to 30th September 1860.

Under Beng. Reg. XVI of 1824 which was passed on the 18th November 1824 and was to come in operation after six weeks from the date of promulgation; as well as under Beng. Reg. X of 1829 which was in operation from 16th June 1829 up to 30th September 1860.

					Amount of duty.
Where the purchase or consideration money therein expressed or denoted shall not exceed ... .. Rs. 50 ...					Rs. A.
Above Rs.	50 and not exceed-				
	ing	Rs.	100	...	1 0
"	100	"	200	...	2 0
"	200	"	500	...	4 0
"	500	"	1,000	...	8 0
"	1,000	"	2,000	...	12 0
"	2,000	"	3,000	...	16 0
"	3,000	"	5,000	...	20 0
"	5,000	"	8,000	...	32 0
"	8,000	"	12,000	...	40 0
"	12,000	"	20,000	..	50 0
"	20,000	"	30,000	..	64 0
"	30,000	"	50,000	..	80 0
"	50,000	"	100,000	...	100 0
"	100,000	"	200,000	...	150 0
And for every further lack of rupees					} .. 100 0
beyond two lacks ... ..					

*From 1st October 1860 to 31st December 1869.*

		<i>Amount of duty.</i>	
When the purchase or consideration money therein expressed or denoted shall not exceed ... .. Rs. 100 ...		Rs. A. 1 0	
Above Rs.	100 and not exceeding	Rs. 200 ..	2 0
"	200	" " 400 ..	4 0
"	400	" " 800 ..	8 0
"	800	" " 1,200 ..	12 0
"	1,200	" " 2,000 ...	20 0
"	2,000	" " 3,000 ...	30 0
"	3,000	" " 4,000 ...	40 0
"	4,000	" " 5,000 ..	50 0
"	5,000	" " 7,500 ...	75 0
"	7,500	" " 10,000 ...	100 0
"	10,000	" " 20,000 ...	150 0
Under Act XXXVI of 1860 as well as under Act X of 1862.	"	20,000	" " 40,000 ... 200 0
	"	40,000	" " 60,000 .. 300 0
	"	60,000	" " 80,000 ... 400 0
	"	80,000	" " 100,000 ... 500 0
And for every further		" " 50,000 ...	200 0
Or part thereof		" " ..	100 0
Conveyances when the consideration is an annuity.		The same Stamp as for a Conveyance when the purchase money is equal to ten times the annuity.	
Conveyances of any kind whatever not otherwise charged, if the value of the property conveyed or of the consideration for the Conveyance be stated or appear on the face of the Conveyance.		The same duty as would be charged if a consideration in money equal to such value were expressed in the Conveyance as the consideration thereof.	
If no value appear on the face of the conveyance.		Fifty Rupees.	

*From 1st January 1870.*

	Conveyance	Amount
		of duty. Rs. A.
Under Act XVIII of 1869.	When the amount paid or secured does not exceed Rs. 50 ... ..	0 8
	When such amount exceeds Rs. 50 but does not exceed Rs. 100 ... ..	0
	For every Rs. 100 or part thereof in excess of Rs. 100 up to Rs. 1,000 ... ..	1 0
	For every Rs. 500 or part thereof in excess of Rs. 1,000 up to Rs. 10,000 ... ..	5 0
	For every Rs. 1,000 or part thereof in excess of Rs. 10,000 up to Rs. 30,000 ... ..	5 0
	For every Rs. 10,000 or part thereof in excess of Rs. 30,000 up to Rs. 100,000 ... ..	50 0
	For every Rs. 20,000 or part thereof in excess of Rs. 100,000 ... ..	75 0

The registration of conveyances of immovable property of the value of one hundred rupees or upwards was made compulsory by Section 13, Act XVI of 1864 which came into force on the 1st January 1865 in the Presidencies of Bengal, Madras and Bombay, as well as by s. 17 of Act XX of 1866, and s. 17 of Act VIII of 1871.

### PRIVY COUNCIL.

*The 18th and 19th May 1876.*

On Appeal from Calcutta High Court.

GIRDHARI SINGH\* (Plaintiff) *Appellant*,

*versus*

HURDEO NARAIN SINGH and others (Defendants) *Respondents*.

*Material error in notification of sale in execution of Decree—Waiver of irregularity by judgment-debtor—Inadequacy of price.*

*Held*, that, although the alleged inadequacy of price alone was no ground for refusing to confirm the sale, yet that the error in specifying the amount of Government revenue was an irregularity for which on proof of substantial injury to the judgment-debtor therefrom the sale might have been set aside, but that the petition of the judgment-debtor praying that a postponement for one month be granted *the attachment and the notification of sale being maintained*, amounted to an admission by him that the notification was correct, or that there was no such irregularity as would be likely to mislead.

\* *Vide* 3, Law Reports, Indian Appeals, p. 280.

*SIR BARNES PEACOCK :—(In delivering judgment said) :—*

Now the only material objection to the notification of the sale was that to which allusion has already been made, namely, that the sudder jumma was stated to be Rs. 3000 odd instead of Rs. 8000 odd. Section 249 directs that the notification of the sale shall state the amount for the recovery of which the sale is ordered specifying the time and place of sale, the property to be sold, and the revenue assessed upon the estate. Not specifying the amount of the revenue correctly was an irregularity for which the sale might have been set aside, provided the judgment debtor had satisfied the Court that he had sustained a substantial injury in consequence of it. The Subordinate Judge says that in the notification the sum of Rs. 3146. 11a. was specified in place of Rs. 8146. 11a., and that there is no doubt that the estate has been sold at a very low price. The High Court deals with that objection. They say, "What are the alleged irregularities?" One of the objections is the mistake with regard to the Government revenue which was payable upon the estate. Then they say: "The error as to the sudder jumma was, if an error at all, and of this there is no evidence, an error in favor of the judgment debtor, for if the sudder jumma was quoted at a lower figure in the proclamation than the recorded sudder jumma, it was not a material error likely to depreciate the bids, but rather to stimulate the bidders at the sale, for intending purchasers could refer to the towji; moreover, this objection was overruled by the Subordinate Judge." Their Lordships do not agree in this reason which was given by the High Court. If an estate is said to be held at a certain Government jumma, the auction purchaser may not know what the real value of the estate is, or what are the rents which are receivable from it. He may, perhaps, have had no opportunity before coming into the auction-room and bidding, to refer to the towji; if the Government revenue were stated to be much less than it really was, he would suppose that the estate was a much less valuable one. In the ordinary mode of assessing the value of estates for the purpose of paying stamp duty or court fees upon the institution of a suit, it was formerly taken that three times the amount of the Government revenue of a permanently settled estate was a fair estimate of the value of the estate; but that was found to be much too low; and in the *Court Fees Act*, VII. of 1870, it was enacted that in assessing the value of estates for the purpose of suits, the value of

the estate should be taken as ten times the amount of the Government revenue; and in those cases in which there was no Government revenue, that fifteen years' purchase of the actual rents should be treated as the estimated value of the estate. Therefore it appears to their Lordships that the High Court was not correct in holding that the error was in favor of the judgment debtor; they think that the error might have been against the interest of the judgment debtor, and that if the sale had been confirmed, and he had proved that he had sustained actual damage by the irregularity, it would in an ordinary case have been a sufficient ground for setting aside the confirmation upon an appeal against it.

But their Lordships must look to another portion of this case. It appears that the sale was fixed for the 5th of August; that the judgment debtor applied to the Court to postpone the sale, and stated that he wished to raise the money, and added, "*Under such circumstances it is prayed that a postponement of one month be granted, the attachment and the notification of sale being maintained.*" Now the notification must have been stuck up at the Court House, and he must have had an opportunity of seeing what the real notification was; and if there was a clerical error in inserting Rs. 3146. 11a. as the Government revenue instead of Rs. 8146. 11a., he ought at that time to have made objection to the notification, and not to have consented to allow the notification to remain and be maintained as the notification under which the sale was to take place. Upon that petition an order was passed which was as follows: "It is ordered that the postponement be granted; that in case of non-payment of the decretal amount the property of the judgment debtor be sold, *without the issue of a second notification of sale*, on the 2nd September, 1872; and that a copy of the notification be suspended in a conspicuous place of the Court House." So that on the application of the judgment debtor himself the sale was postponed, he agreeing that the attachment and the notification of sale should be maintained.

Their Lordships think that the judgment debtor could not properly take objection to that notification by stating that there was an error in it. The petition amounted to an admission on his part that the notification was correct, or that at any rate there was no such mistake or irregularity as would be likely to mislead. Under these circumstances, their Lordships think that the High Court was right in ordering the confirmation of the sale.

A CHAPTER FROM THE (NEW) CIVIL PROCEDURE CODE  
(ACT X OF 1877.)

CHAPTER I.

OF THE JURISDICTION OF THE COURTS AND RES  
JUDICATA.

10. No person shall, by reason of his descent or place of birth, be in any civil proceeding exempted from the jurisdiction of any of the Courts.

No person exempt from jurisdiction by reason of descent or place of birth.

*Note.*

This section corresponds with and is a reproduction of s. 4 of Act VIII of 1859 with slight difference in the wording only.

11. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is barred by any enactment for the time being in force.

Courts to try all civil suits unless specially barred.

*Explanation.*—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

*Notes.*

• This section corresponds with s. 1 of Act VIII of 1859.

• ‘Suits of a civil nature’ referred to in this section mean all suits respecting the succession or right to real or personal property, debts, accounts, contracts, partnerships, marriage, caste, claims to damages for injuries, and generally all suits for the redress of any injury which a person may have sustained in his person or property.

The Civil Courts are, as a general rule, prohibited from interfering in any matter of a criminal nature which is cognizable by the ordinary criminal tribunals except in the case of contempt of Court.

• There are some cases which have a criminal as well as a civil aspect, for instance, assaults, libels, adultery, criminal breach of trust, &c. The Civil Courts have jurisdiction in these cases, and the action will lie, notwithstanding that the Criminal Courts have

taken cognizance of the offence. The rule of English Law that an action cannot be brought for a tort amounting to a felony before the defendant has been prosecuted for the crime does not apply in India. The Court has only to see whether the suit is barred by any legislative enactment. 6, W. R. Civ. Ref. p. 9.

Before considering whether a suit is barred by any statute law, the question must be asked, whether the proposed action is to be taken with reference to a civil right, and whether the proposed suit is one of a civil nature, the general rule being that where there is a civil right there is a civil remedy,—that is to say, that the ordinary Civil Courts are the proper tribunals to which resort must be had for the enforcement of a civil right, and that no wrong of a civil nature shall be without a remedy in the Civil Court. 1, Smith's Leading Cases, p. 216.

The following are some of the legislative enactments barring civil suits :—

Section 1, Act XVIII of 1850 enacts that “ No Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction : provided that he, at the time, in good faith, believed himself to have jurisdiction to do, or order, the act complained of ; and no officer of any Court, or other person bound to execute the lawful warrant or order of any such Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Civil Court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the same.”

Section 491 and 497 of this Code enacts that an award of compensation made for issue of attachment or arrest before judgment or for temporary issue of injunctions obtained on insufficient grounds shall bar any suit for damages for such arrest or attachment or injunction.

By Act XI of 1841, s. 2, it was enacted that \* \* \*  
 “ actions of debt and other personal actions against native officers, soldiers, and other persons amenable to the Articles of War for the native forces in the military service of the East India Company, or resident within any station or cantonment, and carrying on any trade or business in a military bazar, shall be cognizable before a Military



Court, and not elsewhere, provided the value in question shall not exceed Rs. 200, and the defendant was a person of the description above-mentioned, when the cause of action arose, and when the suit was instituted: Provided that no suit shall be brought before any Military Court under this Act to determine any dispute of caste, or concerning any right to real property." *Vide* Beng. Reg. XX of 1825, Madras Reg. VII of 1832, and Bombay Reg. XXII of 1827.

By the Mutiny Act, 31. Vict. Cap. 14, s. 99, it was enacted that "In all places in India where any body of Her Majesty's forces may be serving, situate beyond the jurisdiction of any Court of Small Causes established by or under authority of the Governor-General of India in Council, actions of debt, and all personal actions against officers, or against persons licensed to act as sutlers, or other persons amenable to the provisions of this Act, not being soldiers, shall be cognizable before a Court of Request composed of military officers, and not elsewhere, provided the value in question shall not exceed four hundred rupees, and that the defendant was a person of the above description when the cause of action arose, which Court the commanding officer of any camp, garrison, cantonment, or military post is hereby authorized and empowered to convene, &c."

By statute 21, Geo. III, Cap. 70, it is declared that the Governor-General and Council of Bengal are not subject to the Supreme Court; s. 2 exempts persons from suits in that Court in respect of things done by them under the written order of the Governor-General in Council.

Act XXIII of 1863 (Waste Lands), s. 7, constitutes Courts for the trial of claims to waste lands under the Act; and s. 8 precludes any other Court from entertaining such claims. *Vide* also

Act V of 1866 (Bombay Council) s. 2.

„ XI of 1863 Ditto s. 14.

„ VI of 1851 Ditto s. 22.

„ VI of 1863 (Bengal Council) s. 226.

„ X of 1866 Ditto s. 71.

„ III of 1864 Ditto s. 87.

„ IV of 1866 Ditto s. 99.

Reg. VI of 1831 (Madras) s. 3.

The student is also referred to the paper on CAUSES NOT ACTION-  
ABLE printed in No. 5 of Volume II of the Legal Companion.

12. Except where a suit has been stayed under section 20, the Court shall not try any suit in  
*Pending suits.* which the matter in issue is also direct-

ly and substantially in issue in a previously instituted suit for the same relief between the same parties, or between parties under whom they or any of them claim, pending in the same or any other Court, whether superior or inferior, in British India having jurisdiction to grant such relief, or in any Court beyond the limits of British India established by the Governor-General in Council and having like jurisdiction, or before Her Majesty in Council.

*Explanation.*—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action.

#### NOTES.

This section lays down the law as to *Lis Pendens*.

Section 20 of this Act is as follows :—“ If a suit which may be instituted in more than one Court is instituted in a Court within the local limits of whose jurisdiction the defendant or all the defendants does not or do not actually and voluntarily reside, or carry on business, or personally work for gain, the defendant or any defendant may, after giving notice in writing to the other parties of his intention to apply to the Court to stay proceedings, apply to the Court accordingly; and if the Court, after hearing such of the parties as desire to be heard, is satisfied that justice is more likely to be done by the suit being instituted in some other Court, it may stay proceedings either finally or till further order, and make such order as it thinks fit as to the costs already incurred by the parties or any of them, &c.”

13. No Court shall try any suit or issue, in which  
*Res judicata.* the matter directly and substantially,  
 in issue has been heard and finally  
 decided by a Court of competent jurisdiction, in a former  
 suit between the same parties, or between parties under ..

whom they or any of them claim, litigating under the same title.

*Explanation I.*—The matter above referred to must in the former suit have been alleged by one party and either denied or confessed, expressly or impliedly, by the other.

*Explanation II.*—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

*Explanation III.*—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused.

*Explanation IV.*—A decision is final within the meaning of this section when it is such as the Court making it could not alter (except on review) on the application of either party or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.

*Explanation V.*—Where persons litigate *bonâ fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating.

*Explanation VI.*—Where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction.

#### NOTES.

This section corresponds with s. 2 of Act VIII of 1859. It is to a large extent founded on the definition in Livingston's Code of

Evidence. It deals with *res judicata*, and incidentally with foreign judgments.

"Between parties under whom they or any of them claim" means such parties as succeed to the rights of the parties to the first suit, by inheritance, purchase, gift, or other mode of transfer. The difference between s. 2 of Act VIII of 1859 and this section may be easily marked by noticing that by the former, Courts were directed not to "take cognizance of any suit brought on a cause of action which shall have been heard and determined," while in the latter, it is provided that "no Court shall try any suit or *issue* in which the matter directly and substantially in issue has been heard and finally decided."

*Res judicata* is not a plea to the jurisdiction but a plea in bar.

The rule laid by s. 2 (Act VIII of 1859) must not be too widely construed, and the bar, if there be one, must be made out clearly, as every cause is entitled to be heard once, and if the Courts refuse to entertain a suit which has not really been heard before, injustice is committed (8, W. R. p. 125.)

A judgment which proceeds only upon a technical defect or irregularity, or upon a question of jurisdiction, or upon some special circumstances relating to the position of the parties, and not upon the merits of the case, or which expressly, or by implication, gives liberty to sue again, is no bar to a second suit (7 W. R. p. 97, 236; 3 Madras 84; 2 N. W. P. p. 104).

Though the former suit may have been dismissed because the plaintiff failed to produce evidence in support of his claim, yet the effect of the decision is the same as if judgment had been given after evidence had been adduced on both sides (1, W. R. 343; 1 L. R., 1, Mad. p. 84.)

*Explanation II* is in accordance with a judgment of the Bombay High Court reported in 10, Bom. H. C. Rep. p. 293. *Maktum Valad Mohidin v. Imam Valad Mohidin*. The facts of this case were as follow:—Imam and Maktum are two brothers. In 1866 Imam sued Maktum for a moiety of the family property, movable and immovable, left by their father, to the amount of about Rs. 12,000. He admitted being in possession of about Rs. 1,000, and claimed Rs. 5,000 the remainder of the moiety. In this suit Imam obtained a decree for half a share in a house and two shops,

worth about Rs. 700, the rest of his claim was rejected. In the year 1871, Maktum brought a suit to recover a moiety of the property which he alleged Imam had fraudulently concealed and a moiety of certain other property which Imam in a former suit (which was instituted by him in 1861 but was dismissed) admitted he had been in possession of.

WEST, J. (WITH HIM NANABHAI, J.)—We are of opinion that although the decision, arrived at by the Assistant Judge, cannot be supported on the ground upon which he has placed it, yet the suit was barred by the suit of 1866, in which the present defendant, Imam, was plaintiff with the present plaintiff, Maktum, as defendant. That suit was brought after the death of their father, which occurred in 1862. Imam admitted the possession of a portion of the family estate, but sought still more. If what he sought was more than he was entitled to, Maktum might have urged that fact as a ground of defence. Either Maktum did not urge it or it was not sustained, for the judgment awarded to Imam a portion of the property that he sought. Maktum now comes forward to claim a partition, in his favor, of a portion of the same family property, on the ground that Imam holds more than his share. This was a matter which existed, if at all, at the time when the former suit was brought in 1866. Maktum had an opportunity of bringing it before the Court, and having lost that opportunity cannot now rest a new suit upon it: *Newington v. Levy* (L. R. 6, C. P. 193.) In answer to Imam's averment "You Maktum have an excess," he should have said "No; you Imam have an excess." The former decision implies that the excess was in the hands of Maktum, and he cannot now come forward on the ground that, instead of an excess, there was a deficiency. We, therefore, confirm the decree of the Court below with costs."

*Explanation IV.*—A former judgment, by a Court of competent jurisdiction, upon the same cause of action, is conclusive between the same parties in a subsequent suit brought in another Court, notwithstanding the pendency of an appeal against it; but the Judge passing the decree in the subsequent suit may, on application made to him, and security being given, stay the execution of it, until an appeal in the former suit is decided; and may, if the former decree is reversed, entertain an application for review of his own decision in the subsequent suit. 4, Bom. H. C. Rep. 81.

*Explanation VI.*—A foreign judgment is conclusive as between the parties, when it cannot be questioned upon the ground of fraud or want of jurisdiction, or that it was unduly obtained. 4, W. R. p. 108.

The following illustrations, which were given in the draft but omitted from the Act as unnecessary, might be consulted with advantage:—

*Illustrations.*

The following decisions shall cause the dismissal of a subsequent suit :—

(a). In a suit brought by one of the inhabitants of a village for the purpose of determining a right of way claimed by such inhabitants, a decree is made against him. Such decree shall bar all the other persons claiming the same right under the same title, but not if they claim under a different title.

(b). A sues B for a flock of sheep and obtains a decree. This is a bar to a subsequent suit by B against A for the flock, although the individual animals composing it may not be the same at the time of both suits, for the character of the whole matter in dispute is the same. *Vide I. L. R., 1, Mad. p. 84.*

(c). A sues B for a particular bigha of land. Decree is made in favour of B. A dies intestate and C obtains letters of administration to his estate. B dies testate leaving D his executor who proves his will. C cannot sue D under the same title for any part of the same land.

(d). A sues B for two separate pieces of land. Decree is made in favour of A, who sells the two pieces to C. B cannot afterwards sue C under the same title for either piece separately.

(e). A sues B for Rs. 1,000. The Court decides that this sum was never due to A. A then sues B for interest on the said sum. The decree in the former suit is a bar to this suit; for the subject of the second suit, though not identical with, is incident to, and involved in, the subject of the first.

(f). A sues B for a piece of land bordering on a river and obtains a decree. This decision is a bar to a subsequent suit by B against A for alluvial soil since added to the land, or for trees the growth of the land, or for rent or mesne profits in respect of its occupation, by virtue of the same title under which the land was claimed.

(g). In a suit by A against B respecting lights, the Court decides that the defendant has no right to raise his wall ten feet. This decision is a bar to a suit by B against A to enforce his alleged right to raise the wall twenty feet; for the thing demanded by the latter suit is so included in that which was decided in the former suit, that the decree in the latter suit must confirm or annul the decree in the former suit.

(h). A sues B on a written obligation for the payment of money. Decree is made in favour of B on the ground that the money claimed is not due. This is a bar to a subsequent suit by A against B for money claimed not on the written obligation but on the same transaction. *Vide* I. L. R., 1, Bom. p. 87.

(i). A sues B and C jointly for having together wrongfully fouled the water of a stream running through A's land, and obtains a decree against them. This is a bar to a subsequent suit by A against B separately for the same wrong, even though the decree in the prior suit has remained unexecuted.

(j). B and C jointly divert the water of A's watercourse. A sues B for the diversion, and the suit is dismissed. This is a bar to a subsequent suit by A against C for the same wrong.

(k). A and B, by their joint promissory note, promise to pay C Rs. 1,000. C sues them for non-payment of this sum, and obtains a decree against them. This is a bar to a subsequent suit by C against A on the same note.

The following decisions shall not cause the dismissal of a subsequent suit :—

(l). An interlocutory order that a party shall account ; for this decision is not final.

(m). A decree passed by a subordinate Court under section 618 contingent upon the opinion of the High Court upon a point referred ; for this decision is not final.

(n). A decree of a Court of Small Causes under Act XI of 1865, for Rs. 1,001, ; for this decision has not been given by a Court of competent jurisdiction.

(o). A decree of a like Court for the balance of a partnership account, such balance not having been struck by the parties or their agents ; for such Courts have no jurisdiction to make such decrees.

(p). A decree of a Revenue Court in a suit for rent declaring the validity or invalidity of a bond ; for such Courts have no jurisdiction to make such declarations. *Vide* 6, N. W. P. Rep. p. 77.

(q). A decree in a suit in which it appears on the face of the record that summons has not been served on the defendant or his agent, when the defendant or his agent has not expressly or impliedly waived the necessity of such service.

(r). A decree that the defendant pay the damages which the plaintiff sustained ; for here the decision is uncertain, and is not rendered certain by any part of the record.

(s). A decree that the plaintiff shall recover such compensation as Z shall determine ; for here the decision is not final.

(t). A decree in a suit for three hogsheads of sugar that the defendant pay, at the rate of Rs. 150 per hogshead, the sum of Rs. 460 ; for here the sentence is invalid, evident error appearing on the decree itself.

(u). A decree declaring that the defendant shall go quit of a debt demanded by the plaintiff, and which the defendant had confessed to be due in his written statement in the same suit ; for here the decision is invalid as being contrary to the judicial confession of a party.

(v). A decree given against one not a party to the suit, or against a minor not properly represented by a guardian.

(w). A sues B for one bigha of land. The Court decrees that A shall recover three bighas. The defendant then sues A for the two additional bighas. The former decree is no bar, because it was not in a matter alleged by one party and denied by the other in the suit in which it was made.

(x). A's executor, B, sues C for property belonging to A's estate. It appears that C has no such property and a decree is thereupon made in his favour. Afterwards C gets possession of part of A's estate. The former decree is no bar to a subsequent suit by B against C.

(y). A sues B, C and D. Before the judgment, D's name is struck out of the proceedings. A decree afterwards given in the suit does not bind D, unless his name has been reinstated on the record and is thereon at the date of the judgment.

(z). A sues B and C. Before the judgment D's name is introduced as a party on the record by fraud and without his knowledge. A decree afterwards given in the suit does not bind D unless he has consented to becoming a party.

(aa). A obtains against B a decree declaring that A is the owner of certain land. This is no bar to a subsequent suit by B against A for a right of way over the same land.

(bb). A sues B to obtain a right to an easement for the passage of cattle. Decree is made in favor of B. This is no bar to a subse-



quent suit by A against B for a right of footway ; for the easements are of different kinds.

(cc). A sues B for trespassing on his land. Decree is made in favour of B. This does not bar a subsequent suit by A against B claiming rent from him as tenant of such land.

(dd). A, as executor to B, sues C for certain land. Decree is made in favour of C. A may nevertheless in his own right sue C for the same land ; for here the plaintiff in each suit does not prosecute in the same quality.

(ee). On the death of A, a Hindu, B takes possession of A's land, claiming to hold it as A's adopted son. A's widow, C, sues B for possession as widow. B pleads the adoption. The Court finds that B was not adopted, and decrees in favour of C. On C's death, A's collateral kindred take possession of the land. The former decree does not bar a suit by B against them for possession as A's adopted son, for the collateral kindred do not claim under C.

When foreign judgment  
no bar to suit in British  
India.

14. No foreign judgment shall operate as a bar to a suit in British India—

(a) if it has not been given on the merits of the case :

(b) if it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India :

(c) if it is in the opinion of the Court before which it is produced contrary to natural justice :

(d) if it has been obtained by fraud :

(e) if it sustains a claim founded on a breach of any law in force in British India.

#### NOTES.

\* Foreign judgments, in order to be received as evidence or to be used as a bar to the institution of a suit, must finally determine the points in dispute, and must be adjudications upon the actual merits, and they are open to be impeached upon the ground that the foreign Court had no jurisdiction, whether over the cause, over the subject-matter, or over the parties, or that the defendant never was summoned to answer, or had no opportunity of making his defence, or that the judgment was fraudulently obtained. To deprive a foreign judgment of effect on the ground of want of jurisdiction, it is necessary to show that the defendant was not a subject of the foreign State, or resident, or even present in it at the time when the proceedings were instituted ; and therefore that he could not be bound, by reason of allegiance or domicile, or temporary presence, by the decisions of its Courts ; and further, that the defendant was not the owner of real property in such State, for otherwise, since his property would be under the protection of its laws, he might be considered as virtually present, though really absent.



## PRIVY COUNCIL.

*The 30th November, 1876.*

PRESENT :

Right Hon'ble Sir James Colville, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

*On Appeal from Calcutta High Court.*KONWAR DOORGANATH ROY, *vs.* RAM CHUNDER SEN

*Dewutter Property—Secondary Evidence of a Deed—Impartible nature of property dedicated to an Idol—Shebailh—His Power—Alienation of Dewutter Property.*

Where a property was dedicated to the service and worship of a particular idol, though the idol were a family idol, the property would be impressed with a trust in favour of it. Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction.

Where mention is made of a deed in the rubicari of a Court, in a former suit, this much is held to be proved that a document was put forward at that time, but whether it was a genuine deed, or one put forward to meet the purposes of that suit, is left in doubt and obscurity.

Where no witness has been called who ever saw a particular deed and the person who produced it in the former suit, when called in the subsequent suit does not refer to the deed, and the only search proved to have been made is a search made by a young clerk in the sherista of the zemindary who was not likely to have any knowledge of the deed, and who simply says that upon search he did not find it there,—*held* that under that state of things, it is very doubtful whether secondary evidence of the deed should be permitted at all.

Where a party contends that a property has been inalienably conferred upon an idol to sustain its worship, very strong and clear evidence of such an endowment should be given.

Where a mehal has been really dedicated to an idol, it is no longer a partible estate.

Where a party seeks to set aside a document 30 years old on the ground that it is collusive, he must show that the representation (of legal necessity) made in the deed was not believed by the grantees and that they colluded with the widow to put a pretended consideration. Unless the purchaser is aware at the time he makes the purchase, that the widow intends to apply the money to a different purpose from that stated in the document, he cannot be injured by her concealment of her true object, or by her having subsequently applied the money to a different purpose.

The position of a shebailh to an idol is analogous to that of a manager of an infant. "The power of the manager for an infant heir to charge an estate not his own is under the Hindoo law a limited and a qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where the charge is one that a prudent owner

would make in order to benefit the estate, the *bond fide* lender is not affected by the precedent mismanagement of the estate; the actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But of course, if that danger arises, or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir, grounded on a necessity which his wrong has helped to cause."

This is a suit brought by the appellant Konwur Doorganath Roy to set aside certain alienations of two-thirds of an ancestral mehal called Gopejan, made by his grandmother Rani Rashmoni, on the ground that the mehal had been dedicated to the worship of an idol Radha Mohun Thakoor. The respondents are the successors of the original grantees, or persons deriving title from them. To show the position of Rashmoni at the time she made the alienations in question, and that she may have acted not merely as the widow and heiress of her deceased husband Roy Bijoy Krishna, an *anumati-patra* has been put in, which gave her, undoubtedly, special powers. The *anumati-patra*, or so much of it as is material, is as follows:—"You are my wife. You have no children born to you. I am now very ill in body. I have no hope of life. On my death there will be no one to perform the ancestral *deb kirti* (worship of the gods), &c., and offer the *jolpinda* (funeral cake and libations of water) of my ancestors. For the observance of all these rites, and of the *jolpinda* to the ancestors, as well as the preservation of the *zemin-daris*, *lakiraj*, *dewuttur*, &c., I in my sound mind give you permission on my death to keep possession of my *zemin-daris*, *dewuttur*, &c., recording your own name in the Collectorate *Sherishta*, to remain in enjoyment of the profits, and to defray the expenses of the *deb kirti* during your life-time, and to adopt one or two sons born in the family of true Brahmins. On your death, that adopted son will succeed to all properties; and on the said adopted son attaining his majority, you will, if you should desire it, get his name recorded in the *Zemindari Tahoot*, and surrender the entire management to him;" and then there is this statement: "Now, I am a debtor to *mahajuns* (creditors). Some mehals of the *zemin-dari* are in mortgage on account of those debts. If there should be no other means of liquidating the debts, you will either sell a small portion of the *zemin-dari* or make conditional sale of it, as appears necessary, and liquidate the debts."

Now, undoubtedly, there is a reference to *dewuttur* property in this document, but this document itself creates no endowment; and it is necessary for the plaintiff to show *aliunde* that there was an existing en-

dowment in favour of this particular idol to which the word dewuttur may be referred.

With regard to the position of Rashmoni under the anumati-patra, it would seem that she took a life-interest in the properties, and that power was given to her by it to adopt a son. It must, of course, be admitted that this document gave no authority to Rashmoni to alienate the estate; but she had, as the manager of the estate, power, if it were dewuttur dedicated to the idol, to alienate so much of it as was necessary to keep up the temple and worship of the idol; and if it were secular, to alienate it if it became necessary to do so to preserve the rest of the family estate.

That being her position, she made the two alienations in question. The first is a mourussi mokurruri pottah, which she granted to two persons, Nimai Soondur Roy and Ram Soondur Sen. This pottah describes the estate thus: Turruf Wargopjan *alias* Gowaljan, which is admitted to be the estate Gopejan, "the patrimonial dewuttur rent-free land of Bijoy Krishna Roy, my late husband, the boundaries of which are on the east the Ganges," and so on, "is the dewuttur property of the Sri Sri Iswar Radhamohun Thakoor of Raninuggur, which is in my possession and enjoyment as shebait of the idol." Then the grantor notices the fact that 120 beegahs, or one-third of that mehal, had been decreed to Bhagiruthi Debi, the widow of one of her husband's brothers, Ram Krishna Roy. With the exception of 120 beegahs of mathan land decreed in the suit of Bhagiruthi Debi, widow of the late Ram Krishna Roy, the eldest brother of my late husband, the remaining lakheraj lands," and so on. The document proceeds: "Now the temple of the Sri Sri Iswar being broken, and necessary repairs and various other things being requisite for the service of the idol, I have given you a settlement as a mourussi mokurruri talook of the entire lakheraj zemindari rights in the said mouzah, at a fixed premium of Rs. 325, for a consideration of Company's Rs. 1,900, which I have received in cash and in full weight." That is the substance of the document.

The other document is executed by Rashmoni in favour of Soondur Krishna Sen, one of the family of one of the grantees of the mokurruri. It is a bill of sale of the proprietary right to the extent of Rs. 300 of the mokurruri rent, and it says: "Deducting the land of the said decree, the remainder is my own right," referring to the decree in favour of Bhagiruthi, "a mourussi and mokurruri talook, representing the entire

right in the lakheraj zemindari, was given in settlement of Nimai Soondur Roy, inhabitant of Naharpara, and Ram Soondur Sen, inhabitant of Koridha, at an annual jumma of Rs. 325, exclusive of collection charges, on the 18th of Cheyt, of the year 1254. They hold possession of the property as a mourussi and mokurruri talook, and are paying the fixed jumma. I, agreeably to the instructions of my late husband, have commenced building the temples of Sri Sri Iswar Radhamohun Thakoor Jeo and others, but being in want of means, am unable to carry out the instructions of my husband. I have voluntarily, in my sound senses, sold to you, for Company's Rs. 1,700, my own entire share of 14 annas, 15 gundahs, 1 cowri, 2 kags out of 16 annas of the said mourussi mukurruri mouzah, the jumma of which is Rs. 300."

Mr. Leith, on the part of the appellant, undertook to satisfy their Lordships that this mehal of Gopejan had been dedicated to the idol, and therefore it was incompetent for Rashmoni to make these alienations.

Now, apart from the admissions contained in the mourussi pottah and the bill of sale themselves, their Lordships are clearly of opinion, in accordance with the view of the High Court, that the evidence fails to show that this land was so dedicated.

Mr. Leith opened his case by an endeavour to show a deed of foundation or endowment of the idol by the gift of this estate from Rajah Mahanund, who was the father of Rajah Bijoy Krishna, the husband of Rani Rashmoni.

It may be convenient to state here the position of the family so far as it is material to the present case. Rajah Mahanund, who, it is said, was the founder of this endowment, died in 1805 or 1806. He had a son Bijoy, who left a widow, Rashmoni, giving her the anumati-patra, to which reference has already been made. She, it appeared, lived until February 1870. She exercised the power of adoption given to her by her husband, and adopted Krishna Chunder, who married Rani Prosunomyi Debi. He also had no son; and he also gave to his wife a power of adoption, which she exercised in favor of the appellant, Konwur Doorganath Roy. It appears that Rajah Bijoy had two brothers, and one of them married a lady of the name of Bhaguruthi Debi, who in the year 1855 brought a suit against Rashmoni, and obtained the decree already mentioned, to recover one-third of the mehal of Gopejan.

If the deed of endowment from Rajah Mahanund were satisfactorily proved, and it were an endowment which dedicated this mehal to the

service and worship of a particular idol, then, though the idol were a family idol, the property would be impressed with a trust in favor of it. Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction. No question, however, of that kind arises in the present case.

The proof of this deed of endowment, which is said to have been executed by the Rajah Mahanund, when it comes to be investigated, is of the most unsatisfactory description. First, the existence of such a deed at all is not clearly made out; and so far as the document, the rubicari of a former suit, is relied upon as showing its contents, the description there given is so obscure that it is impossible to say whether the whole of the mehal of Gopejan was included in the supposed dedication or not.

First, with respect to the nature of the proof; what is relied upon as evidence of the deed is a rubicari of a proceeding in a former suit brought by a creditor against Rashmoni in the year 1840. It appears that in that suit certain property was attached, and that Rashmoni, in order to get rid of the attachment, set up that the property so attached was dewuttur property dedicated to the idol Radha Mohun Thakoor. It appears from the rubicari that this deed was put forward by a man called Bhuttacharjya, who was the tasildar of Rani Rashmoni. Neither the deed itself nor a copy has been produced in the present suit. No witness has been called who ever saw it; and it is to be observed that though Bhuttacharjya was called as a witness in the suit brought by Prosunmoyi, on behalf of the present appellant, to set aside these deeds during the life-time of Rashmoni, and which was dismissed, because it was considered to be incompetent to institute it during the life-time of Rashmoni, he was not asked any question about this deed.

The state of the case, then, is this: No evidence has been given of the existence of such a deed, except the mention of it in the rubicari; no witness has been called who ever saw it. The man who produced it in the creditor's suit, when called in Prosunmoyi's suit, does not refer to it; and the only search which has been proved is a search made by some clerk in the sherista of the zemindary—a young clerk who was not likely to have any knowledge of the deed, and who simply says that upon search he did not find it there.

In that state of things their Lordships think it is very doubtful

whether secondary evidence of the deed should be permitted at all ; but if it be allowed, then they are to judge of the effect of the secondary evidence, and to determine, in the first place, whether it satisfied them that such a deed really existed at all. Now, from the circumstances which have been already pointed out, they are by no means satisfied that such a deed ever did exist. That a document of the kind was put forward by Bhuttacharjya on behalf of Rashmoni in the creditor's suit is proved by the rubicari; but whether it was a genuine deed, or one put forward to meet the purposes of that suit, is left in doubt and obscurity.

But assuming that a deed did exist, and that it was to the effect which is referred to in the rubicari, their Lordships find that the question, what property was included in it, is left in considerable obscurity. It appears that the property which had been attached was a brick-built house and garden. The rubicari states : " It appears from a perusal of the whole of the papers of the record, that for the payment of the money due to the plaintiff, the brick-built house and garden, &c., belonging to the defendant, were under attachment. After issue of notice of auction sale, the objector above-mentioned filed a petition, stating, among other matters, that the properties which were assigned by Raja Mahanund Roy, father-in-law of the defendant, for the worship of the idol Radha Mohun Thakoor, &c., established by the Raja, cannot be sold or transferred by his heirs." It appears that there was an order that the sale should be stayed, and that the objector should file proofs of his statement. The rubicari states : " Accordingly the objector filed the Shevaitnama of the 5th of Aughran 1202, under seal and signature of Raja Mahanund, accompanied by an isumnuvisi containing the names of four witnesses." Then : " The objector has also filed a copy of the nikas paper of the year 1213, bearing the seal and signature of the Collector, to prove that the properties of the deb-sheva, as aforesaid, are part and parcel of the lakheraj mouzah Gowaljan." That appears to be this mouzah Gopejan. This is the only phrase which can be relied upon as showing that the entire mehal was included in the supposed endowment. But the passage is in itself obscure. The literal reading of it is that the brick-built house, garden, &c., which had been devoted to the idol, were part and parcel of the lakheraj mouzah Gowaljan. It is quite consistent with that statement that these parcels had been taken out of that lakheraj mouzah and devoted to the idol.

Therefore, in addition to the insufficiency of the proof to satisfy their Lordships with reasonable certainty that such a document really

existed, there is so much obscurity in the language that it is impossible to say that if it did exist it included the whole of this mehal.

If that document is out of the case, there is very slight evidence indeed of any such endowment. The case then rests, independently of the admissions in the deeds, upon the evidence of the dewan and mooktear and one or two other witnesses, that the rents of this mehal Gopejan were applied to the worship of this idol. But that evidence is extremely vague and extremely loose. The mooktear says in several places that the rents were applied to the worship of the idols, and it is plain from all the evidence in the case that there were several idols belonging to this family, and no doubt the rents of some of the family mehals were applied to sustain their temples and worship. But supposing it to be taken that the rents of this mehal were applied during the period that the witnesses speak of, to the worship of the idol Radha Mohun, that fact is by no means sufficient to establish the onus which lies upon a party who sets up the case that property has been inalienably conferred upon an idol to sustain its worship. Very strong and clear evidence of such an endowment ought to exist. In the present case there is no proof that priests were appointed. If any had been appointed, they might have been called. There is no production of accounts showing that the rents were separately collected and applied for the worship of this idol. For anything that appears, the rents may have gone into the general body of the accounts relating to the estates of this family, and there is really no document whatever upon which the finger can be placed to show that an endowment was made, other than that rubicari to which reference has already been made.

Besides the weakness of the proof of endowment on the part of the plaintiff, strong presumptions that there was none arise from other facts and circumstances in the case. It is said that the application of the rents of this particular mehal for a certain period to this idol is some evidence that the family were aware that the rents were properly and by rights so to be devoted; but if the conduct of the family is to be regarded, there is, on the other side, the strongest indication from what occurred in the suit brought by Bhagiruthi, the widow of the eldest brother of Bijoy, that the family understood that there was no such endowment. That suit was brought by Bhagiruthi to recover from Rashmoni one-third of the mehal in question. She did not claim it as property to which she was entitled as joint shebait, but she claimed it as one-third of the family estate to which she, as widow of one of the



brothers, was entitled. That is her claim. Rashmoni does not set up as a defence that the mehal was dewuttur property devoted to this idol, that she was the shebait, and entitled, at all events, to the possession and the management of it—she sets up no case of that sort—but allows a decree to be passed against her in favour of Bhagiruthi to recover one-third of the mehal, and in that decree the property is described, not as dewuttur, but as bromuttur property.

Now, if this mehal had been really dedicated to the idol, it would no longer have been a partible estate. Rashmoni would, as shebait, have been entitled to the possession of it, and to the management and disposition of the revenues; and all that Bhagiruthi could have been entitled to would have been a share in the surplus revenues, if there should have been a surplus, after due provision had been made for the worship of the idol.

Therefore there is not only weakness of proof on the part of the plaintiff, but a very strong presumption, arising from the conduct of the parties in the suit in question, that this was not dewuttur property such as it is alleged to be on the part of the plaintiff.

Supposing the case had rested there, their Lordships feel no doubt whatever that the judgment of the High Court was perfectly right. But it does not rest there, and it now becomes material to consider the terms of the mourussi pottah and of the bill of sale. Mr. Leith, in his reply, very properly relied on them as being the strength of his case. If they are to be used as evidence only, then this evidence must be weighed with all the other evidence in the case, and so weighing it, their Lordships are not satisfied that it turns the scale in favour of this property being dewuttur. But the statements in these deeds are relied upon by the plaintiff as an admission which estops the parties to them from asserting that these lands were not dewuttur. But if the statements are relied on in this way, they must be taken as a whole; and so taking them, it would appear that, granting the lands were dewuttur, the sale would be justifiable, the statement being that the sale was made for the purpose of the repair of the temple of the idol. The mokurruri was granted according to the statement, because the temple was out of repair, and money was wanted to restore it. The sale of part of the mokurruri rent was granted in consideration of money stated to be required for the completion of the temple, which it was stated was already in course of erection. If, therefore, the statements in these deeds are

taken as a whole, the alienations they contain were justifiable, assuming the property to have been dewuttur land.

What, then, is the plaintiff's position? These deeds are 30 years old, and he comes into Court to set them aside upon the ground that they were collusive; and if he could have shown that the representation, although made, was not believed by the grantees, and that they colluded with Rashmoni to put a pretended consideration on the face of the deeds, he might have succeeded. But there is no evidence whatever of any such collusion. There is nothing to show that the original grantees did not believe the statements appearing upon the face of the deeds; indeed, if they had made inquiry they would have found that the fact agreed with the statement, for it appears upon the evidence and upon the finding of the subordinate Judge that the temples were out of repair. If, then, the temples were out of repair, and if Rashmoni offered this mokurruri pottah to raise money for the purpose of doing the repairs that the temple required, the purchaser, who *bonâ-fide* took it upon that representation, would clearly be entitled to keep his purchase. It may be that Rashmoni did not intend to apply the money to the purpose for which she professed to require it. It may be that she always intended to apply it to the payment of the Government revenue, as it appears that in point of fact she did. But unless the purchaser was aware at the time he made the purchase that that was her intention, and that the statement in the deed was a colourable one, he could not be injured by her concealment of her true object, or by her having subsequently applied the money to a different purpose. She, as the manager of this estate, had the same right, or an analogous right to that of the manager of an infant heir; and that was defined in very plain language in the case in 6th Moore, page 423: "The power of the manager for an infant heir to charge an estate not his own is under the Hindoo law a limited and a qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ-fide* lender is not affected by the precedent mismanagement of the estate; the actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But, of course, if that danger arises, or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir, grounded on a ne-

cessity which his wrong has helped to cause. Therefore the lender in this case, unless he is shown to have acted *malâ-fide*, will not be affected though it be shown that with better management the estate might have been kept free from debt. Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself, as much as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge; and they do not think that under such circumstances he is bound to see to the application of the money." That passage was adopted in a very late case before this Board, *Prosunno Kumari Debya v. Golab Chand Baboo*, in the 2nd Law Reports, Indian Appeals, page 151. In that case a shebait had incurred debts and mortgaged the property of the idol for the purpose of the necessary sustentation of the worship of the idol; and this tribunal held that the position of the shebait was analogous to that of a manager of an infant, and that he had the same authority, which in both cases arises from the necessity of the case, to raise money for the benefit of the estate. Here it cannot be said the grant of a *mokurruri pottah* was an improvident way of raising money if it were necessary to do it at all. It still left a rent for the sustentation of the idol; and if the transaction be *bond-fide*, the subsequent sale of part of the rent was justified by the imperious necessity of finishing the temple which had been commenced.

On these grounds, therefore, their Lordships think that, assuming the purchasers to be bound by the representations in the deeds, there being no evidence that they did not put entire faith in them, the grants cannot now be impeached.

It was objected on the part of the plaintiff that this answer had not been put forward by the defendants, and undoubtedly they have relied more strongly upon the defence that the land was not *dewuttur* land at all. But several paragraphs in the written statements were pointed out, in which the case was made. It is no doubt alleged in these paragraphs that the money was wanted for two purposes, for the sustentation of the worship of the idol and the repairs of the temple, and also for the payment of Government revenue. But their Lordships think that there is enough in those statements to allow of the present answer to the estoppel being made on the part of the respondents, and it is to

be observed that in the suit brought by Prosonnomoyi during the lifetime of Rashmoni, in which the original grantee, Sen, was a party, he there set up the defence in a perfectly correct form, namely, that the representation made was that the money was wanted for the repairs of the temple, and that he advanced it for that purpose.

But assuming the facts to be as alleged in the statement of defence, their Lordships are still of opinion that the plaintiff could not succeed on this plaint in setting aside the deeds; because if part of the money only was required for the repairs of the idol, or was represented to have been so required, and this was *bonâ-fide* believed in by the grantees, the deeds would not be wholly void by reason that some of the money was raised for another purpose. It would then come to this, that too much of the idol's property may have been granted, and that a less quantity of land than that included in the grants would have sufficed to raise the money required for the temples; but that would not be a sufficient ground for setting aside the deeds altogether. The plaintiff in that case should have offered to reimburse the *bonâ-fide* purchasers so much of the money as had been legitimately advanced.

Their Lordships, in making these last observations, do not wish it to be understood that this is the case which appears upon the facts; they make these observations with reference only to the pleadings, and to indicate that, supposing that technical objection could have been made to the pleadings, it still would not have availed the appellant in the present appeal, because even so his suit in the present form could not have been sustained.

On the whole, therefore, their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

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## A ELEMENTARY COURSE OF LAW LECTURES.

### LECTURE III.

#### *On Will or Testament.*

In Hindoo law there is no such thing as a true Will. The place filled by Wills is occupied by Adoptions. We can now see the relation of the Testamentary Power to the Faculty of Adoption, and the reason why the exercise of either of them could call up a peculiar solicitude for the performance of the *sacra*. Both a Will and an Adoption threaten

a distortion of the ordinary course of Family descent, but they are obviously contrivances for preventing the descent being wholly interrupted, when there is no succession of kindred to carry it on. Of the two expedients Adoption, the factitious creation of blood-relationship, is the only one which has suggested itself to the greater part of archaic societies. The Hindoos have indeed advanced one point on what was doubtless the antique practice, by allowing the widow to adopt when the father has neglected to do so, and there are in the local customs of Bengal some faint traces of the Testamentary powers. But to the Romans\* belongs pre-eminently the credit of inventing the Will, the institution which, next to the Contract, has exercised the greatest influence in transforming human society. We must be careful not to attribute to it in its earliest shape the functions which have attended it in more recent times. It was at first, not a mode of distributing a dead man's goods, but one among several ways of transferring the representation of the household to a new chief. The goods descend no doubt to the Heir, but that is only because the government of the family carries with it in its devolution the power of disposing of the common stock. It will be found that Wills were never looked upon in the Roman community as a contrivance for parting Property and the Family, or for creating a variety of miscellaneous interests, but rather as a means of making a better provision for the members of a household than could be secured through the rules of Intestate Succession.

It seems that Testaments were at first only allowed to take effect on failure of the persons entitled to have the inheritance by right of blood genuine or fictitious. Thus, when Athenian citizens were empowered for the first time by the Laws of Solon to execute Testaments, they were forbidden to disinherit their direct male descendants. So too, the Will of Bengal is only permitted to govern the succession so far as it is consistent with certain over-riding claims of the family.

We have it stated on abundant authority that Testaments, during the primitive period of the Roman State, were executed in the Comitia Calata, that is, in the Comitia Curiata, or Parliament of the Patrician Burghers of Rome, when assembled for Private Business. This mode

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\* The only form of testament, not belonging to a Roman or Hellenic society, which can with any reason be supposed indigeneous, is that recognised by the usages of the province of Bengal; and the testament of Bengal, which some have even supposed to be an invention of Anglo-Indian lawyers, is at most only a rudimentary Will.

of execution has been the source of the assertion, handed down by one generation of civilians to another, that every Will at one era of Roman history was a solemn legislative enactment. But there is no necessity whatever for resorting to an explanation which has the defect of attributing far too much precision to the proceedings of the ancient assembly. The proper key to the story concerning the execution of Wills in the *Comitia Calata* must no doubt be sought in the oldest Roman law of *intestate* succession. The canons of primitive Roman jurisprudence regulating the inheritance of relations from each other were, so long as they remained unmodified by the Edictal Law of the *Prætor*, to the following effect:—First, the *sui* or direct descendants who had never been emancipated succeeded. On the failure of the *sui*, the Nearest Agnate came into their place, that is the nearest person or class of the kindred who was or might have been under the same *Patria Potestas* with the deceased. The third and last degree came next, in which the inheritance devolved on the *gentiles*, that is, on the collective members of the dead man's *gens* or House.\* Now the Patrician Assembly called the *Comitia Curiata* was a Legislature in which *Gentes* or Houses were exclusively represented. It was a representative assembly of the Roman people, constituted on the assumption that the constituent unit of the state was the *Geus*. This being so, the inference seems inevitable, that the cognisance of Wills by the *Comitia* was connected with the rights of the *Gentiles*, and was intended to secure them in their privilege of ultimate inheritance. The whole apparent anomaly is removed, if we suppose that a Testament could only be made when the Testator had no *gentiles* discoverable, or when they waived their claims, and that every Testament was submitted to the General Assembly of the Roman *Gentes*, in order that those aggrieved by its dispositions might put their veto upon it if they pleased, or by allowing it to pass might be presumed to have renounced their reversion.

The Testament to which the pedigree of all modern Wills may be traced is not, however, the Testament executed in the *Calata Comitia*, but another Testament designed to compete with it and destined to supersede it. The historical importance of this early Roman Will, and the light it casts on much of ancient thought, will excuse me for describing it at some length.

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\* The House was a fictitious extension of the family, consisting of all Roman Patrician citizens who bore the same name and who, on the ground of bearing the same name, were supposed to be descended from a common ancestor.

When the Testamentary power first discloses itself to us in legal history, there are signs that, like almost all the great Roman institutions, it was the subject of contention between the Patricians and the Plebians. The effect of the political maxim, *Plebs Gentem non habet*, "a Plebian cannot be a member of a house," was entirely to exclude the Plebians from the Comitia Curiata. Some critics have accordingly supposed that a Plebian could not have his Will read or recited to the Patrician Assembly, and was thus deprived of Testamentary privileges altogether. Others have been satisfied to point out the hardships of having to submit a proposed Will to the unfriendly jurisdiction of an assembly in which the Testator was not represented. Whatever be the true view, a form of Testament came into use, which has all the characteristics of a contrivance intended to evade some distasteful obligation. The Will in question was a conveyance *inter vivos*, a complete and irrevocable alienation of the Testator's family and substance to the person whom he meant to be his heir. The strict rules of Roman law must always have permitted such an alienation, but when the transaction was intended to have a posthumous effect, there may have been disputes whether it was valid for Testamentary purposes without the formal assent of the Patrician Parliament.

The Plebian Will acquired at Rome all the popularity which the Testament submitted to the Calata Comitia appears to have lost. The key to all its characteristics lies in its descent from the *Mancipium*, or ancient Roman conveyance, a proceeding to which we may unhesitatingly assign the parentage of two great institutions without which modern society can scarcely be supposed capable of holding together, the Contract and the Will. The Mancipium, or, as the word would exhibit itself in later Latinity, the Mancipation, carries us back by its incidents to the infancy of civil society. As it sprang from times long anterior, if not to the invention, at all events to the popularisation, of the art of writing, gestures, symbolical acts, and solemn phrases take the place of documentary forms, and a lengthy and intricate ceremonial is intended to call the attention of the parties to the importance of the transaction, and to impress it on the memory of the witnesses. The imperfection, too, of oral, as compared with written, testimony necessitates the multiplication of the witnesses and assistants beyond what in later times would be reasonable or intelligible limits.

The Roman Mancipation required the presence first of all of the parties, the vendor and vendee or more technically grantor and grantee.

There were also no less than *five* witnesses; and an anomalous personage, the *Libripens*, who brought with him a pair of scales to weigh the uncoined copper money of ancient Rome. The Testament we are considering—the Testament *per æs et libram*, “with the copper and the scales,” as it long continued to be technically called—was an ordinary Mancipation with no charge in the form and hardly any in words. The Testator was the grantor; the five witnesses and the *libripens* were present; and the place of grantee was taken by a person known technically as the *familiæ emptor*, the Purchaser of the Family. The ordinary ceremony of a Mancipation was then proceeded with. Certain formal gestures were made and sentences pronounced. The *Emptor familiæ* simulated the payment of a price by striking the scales with a piece of money, and finally the Testator ratified what had been done in a set form of words called the “Nuncupatio” or publication of the transaction, a phrase which has had a long history in Testamentary jurisprudence. It is necessary to attend particularly to the character of the person called *familiæ emptor*. There is no doubt that at first he was the Heir himself. The Testator conveyed to him outright his whole “*familia*,” *i. e.*, all the rights he enjoyed over and through the family; his property, his slaves, and all his ancestral privileges, together, on the other hand, with all his duties and obligations.

With these data before us, we are able to note several remarkable points in which the Mancipatory Testament, as it may be called, differed in its primitive form from a modern Will. As it amounted to a conveyance *out and out* of the Testator’s estate, it was not *revocable*. There could be no new exercise of a power which had been exhausted.

Again, it was not secret. The *Familiæ Emptor*, being himself the Heir, knew exactly what his rights were, and was aware that he was irreversibly entitled to the inheritance. But perhaps the most surprising consequences of this relation of Testaments to conveyances was the immediate vesting of the Inheritance in the Heir. This has seemed so incredible to not a few civilians, that they have spoken of the Testator’s estate as vesting conditionally on the Testator’s death, or as granted to him from a time uncertain, *i. e.*, the death of the grantor. But down to the latest period of Roman jurisprudence there was a certain class of transactions which never admitted of being directly modified by a condition, or of being limited to or from a point of time. In technical language they did not admit *conditio* or *dies*. Mancipation was one of them, and therefore, strange as it may seem, we are forced to conclude



that the primitive Roman Will took effect at once, even though the Testator survived his act of Testation. It is indeed likely that Roman citizens originally made their Wills only in the article of death, and that a provision for the continuance of the family effected by a man in the flower of life would take the form rather of an Adoption than of a Will. Still we must believe that, if the Testator did recover, he could only continue to govern his household by the sufferance of his Heir.

Originally the essential character of the formalities had required that the Heir himself should be the Purchaser of the Family, and the consequence was that he not only instantly acquired a vested interest in the Testator's Property but was formally made aware of his rights. But the age of Gaius permitted some unconcerned person to officiate as Purchaser of the Family. The Heir, therefore, was not necessarily informed of the succession to which he was destined; and Wills thenceforward acquired the property of *secrecy*. The substitution of a stranger for the actual Heir in the functions of "Familie Emptor" had other ulterior consequences. As soon as it was legalised, a Roman Testament came to consist of two parts or stages,—a Conveyance, which was a pure form, and a Nuncupatio, or Publication. In this latter passage of the proceeding, the Testator either orally declared to the assistants the wishes which were to be executed after his death, or produced a written document in which his wishes were embodied. It was not probably till attention had been quite drawn off from the imaginary Conveyance, and concentrated on the Nuncupation as the essential part of the transaction, that Wills were allowed to become *revocable*.

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### BOMBAY HIGH COURT.

*The 18th July, 1876.*

PRESENT :

Mr. Justice Kemball, Mr. Justice Nanabhai Haridas and Mr. Justice Melvill.

REG. *vs.* GOVINDA.\*

*Murder—Culpable homicide—Indian Penal Code (Act XLV. of 1860),  
Sections 299 and 300.*

Where the prisoner knocked his wife down, put one knee on her chest, and struck her two or three violent blows on the face with the closed fist, producing extravasation of blood on the brain, and she died in consequence, either on the spot, or very shortly afterwards,

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\* *Vide* I. L. R., 1, Bom. Series, p. 342.

*Held*, that there being no intention to cause death, and the bodily injury not being sufficient in the ordinary course of nature to cause death, the offence committed by the prisoner was not murder, but culpable homicide not amounting to murder.

Their Lordships at the outset intimated to the Government Pleader that there was a difference of opinion between them as to what offence the prisoner had committed, and that the case should accordingly be referred to Melvill, J., for his opinion.

In reviewing the case, Mr. Justice Kimball minuted thus :—

“That the prisoner was exceedingly cruel to his wife, and that he was legally guilty of her murder, I have no doubt; but having regard to the circumstances, the age of the prisoner, and the manifest state of doubt of the Judge as to what would be the appropriate sentence, make me hesitate to confirm the sentence of death, and I am disposed to alter it to transportation for life.”

Mr. Justice Nanabhai Haridas' minute ran thus :—

“I am not satisfied that the prisoner intended to murder his wife. There is hardly evidence sufficient to prove the ‘intention’ or ‘knowledge’ requisite under section 300, Indian Penal Code.

“That the prisoner acted cruelly, is quite clear. Still there is no evidence that he beat her otherwise than with his fist on the face, the blow or blows on the nose causing effusion of blood on the brain which proved fatal. The kicks on the back and the blows on the chest were not the cause of death according to the doctor's evidence. It is quite possible—by no means improbable—that he may have, as he says, only intended to chastise her, though rather severely. I am disposed to think his act was culpable homicide not amounting to murder, and that it is punishable under Section 304, Indian Penal Code.

“No apparent motive is shown for taking her life.

“People often survive such blows, and the prisoner may have only intended to cause hurt, though aware that hurt might prove dangerous.”

MELVILL, J. :—I understand that these proceedings have been referred to me under Section 271-B of the Code of Criminal Procedure, in order that I may decide whether the offence committed by the prisoner was murder, or culpable homicide not amounting to murder.

For convenience of comparison, the provisions of Sections 299 and 300 of the Indian Penal Code may be stated thus :—

Section 299.

A person commits culpable ho-

Section 300.

Subject to certain exceptions, cul-

homicide, if the act by which the death is caused is done

(a) With the intention of causing death ;

(b) With the intention of causing such bodily injury as is *likely* to cause death ;

(c) With the knowledge that \* \* \* the act is *likely* to cause death.

pable homicide is murder, if the act by which the death is caused is done

(1) With the intention of causing death ;

(2) With the intention of causing such bodily injury as the offender *knows to be likely* to cause the death of *the person to whom the harm is caused* ;

(3) With the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is *sufficient in the ordinary course of nature* to cause death ;

(4) With the knowledge that the act is *so imminently dangerous that it must in all probability cause death*, or such bodily injury as is likely to cause death.

I have underlined the words which appear to me to mark the differences between the two offences.

(a) and (1) show that where there is an intention to kill, the offence is always murder.

(c) and (4) appear to me intended to apply (I do not say that they are necessarily limited) to cases in which there is no intention to cause death or bodily injury. Furious driving, firing at a mark near a public road, would be cases of this description. Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide ; if it is the most probable result, it is murder.

The essence of (2) appears to me to be found in the words which I have underlined. The offence is murder, if the offender *knows* that the *particular person injured* is likely, either from peculiarity of constitution, or immature age, or other special circumstance, to be killed by an injury which would not ordinarily cause death. The illustration given in the section is the following :—

“ A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health.”

There remain to be considered (b) and (3), and it is on a comparison of these two clauses that the decision of doubtful cases like the present must generally depend. The offence is culpable homicide, if the bodily injury intended to be inflicted is *likely* to cause death ; it is murder, if such injury is *sufficient in the ordinary course of nature* to cause death. The distinction is fine, but appreciable. It is much the same distinction as that between (c) and (4), already noticed. It is a question of degree of probability. Practically, I think, it will generally resolve itself into a consideration of the nature of the weapon used. A blow from the fist or a stick on a vital part may be likely to cause death ; a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death.

In the present case the prisoner, a young man of 18, appears to have kicked his wife (a girl of 15) and to have struck her several times with his fist on the back. These blows seem to have caused her no serious injury. She, however, fell on the ground, and I think that the evidence shows that the prisoner then put one knee on her chest, and struck her two or three times on the face. One or two of these blows, which, from the medical evidence, I believe to have been violent and to have been delivered with the closed fist, took effect on the girl's left eye, producing contusion and discoloration. The skull was not fractured, but the blow caused an extravasation of blood on the brain, and the girl died in consequence either on the spot, or very shortly afterwards. On this state of facts the Sessions Judge and the assessors have found the prisoner guilty of murder, and he has been sentenced to death. I am myself of opinion that the offence is culpable homicide, and not murder. I do not think there was an intention to cause death ; nor do I think that the bodily injury was sufficient in the ordinary course of nature to cause death. Ordinarily, I think, it would not cause death. But a violent blow in the eye from a man's fist, while the person struck is lying with his or her head on the ground, is certainly likely to cause death, either by producing concussion or extravasation of blood on the surface or in the substance of the brain. A reference to Taylor's Medical Jurisprudence (Fourth Edition, page 294) will show how easily life may be destroyed by a blow on the head producing extravasation of blood.

For these reasons I am of opinion that the prisoner should be convicted of culpable homicide not amounting to murder, and I would sentence him to transportation for seven years.

This order was accordingly passed by the Court.

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**MADRAS HIGH COURT.**

*The 16th October, 1876..*

**PRESENT :**

Mr. Justice Holloway and Mr. Justice Innes.

**PROCEEDINGS,\* 16TH OCTOBER, 1876.**

*Evidence—Confession of co-prisoner—Act I. of 1872, Section 30.*

A conviction based solely on the evidence of a co-prisoner is bad in law.

Upon a reference, by the Magistrate of Bellary, of the Proceedings of the 2nd-class Magistrate of Kumply in Cases Nos. 158 and 159 of 1876, as contrary to law, the High Court passed the following

**RULING.**—In these cases two prisoners have been convicted of theft and have each been sentenced to be rigorously imprisoned for four months in the first case and for two months in the second.

The only evidence against the second prisoner was a confession made by the first prisoner. Evidence was also given of a statement made by the second prisoner to a police constable: this statement, however, should not have been admitted in evidence.

The High Court has already ruled (High Court Proceedings, 24th January 1873) that a conviction based solely upon the evidence of a co-prisoner is bad in law.

The conviction of the second prisoner is accordingly annulled. The Magistrate will forthwith discharge the second prisoner from custody.

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**BOMBAY HIGH COURT.**

*The 17th August, 1876.*

**PRESENT :**

Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

**REG. vs. PARSAP† MAHADEVAPA.**

*Contempt of Court.*

The accused was tried and convicted by the Second Class Magistrate of Haliyál for continuance of nuisance after injunction to discontinue it under Section 291 of the Indian Penal Code. The injunction having been issued by the Magistrate himself, Mr. Macdonald doubted the legality of the trial before that Magistrate; and hence referred the case for the orders of the High Court.

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\* *Vide* I. L. R., 1, Madras Series, p. 163.

† *Vide*, I L. R., 1, Bom. Series, p. 339.

The case was heard by MELVILL and NANABHAI HARIDAS, JJ.

Neither the accused nor the Crown was represented.

PER CURIAM :—The Court does not think that it can follow the Allahabad High Court\* in holding that Section 473 of the Criminal Procedure Code, when it says that no Court shall try any person for an offence committed in contempt of its own authority, is to be limited to offences falling under Chap. X. of the Indian Penal Code. The reasons given by the Madras High Court for extending the section, at all events, to the offences against public justice and the offences relating to documents mentioned in Sections 468 and 469 of the Criminal Procedure Code are, in the Court's mind, conclusive; and a Division Bench of this Court seems to have been of opinion that the section must be held applicable to all contempts of Court. If the limitation imposed upon the section by the Allahabad Court be removed, as the Court thinks it must, the section must necessarily be held applicable to the case now before it; for the continuance of a nuisance, after the Magistrate's injunction to desist, is clearly a contempt of the Magistrate's authority.

The Court considers it must, therefore, annul the conviction and sentence.

## CALCUTTA HIGH COURT.

*The 11th September, 1876.*

PRESENT :

*Mr. Justice Markby and Mr. Justice Mitter.*

IN THE MATTER OF JUGGUT CHUNDER CHUCKERBUTTY.†

*Criminal Procedure Code (Act X. of 1872), ss. 294 and 297—Revision  
—Power of High Court—“Material Error.”*

In a case of apprehended breach of peace, the Magistrate bound over the parties in sums of money aggregating on the whole to Rs. 60,000 or upwards. The High Court quashed the order, holding that it was altogether unreasonable.

MARKBY, J. (In delivering judgment said) :—The Sessions Judge is quite right in supposing that this Court would not ordinarily interfere with the discretion of Magistrates, as to the amount of security to be taken in cases of this kind. The Magistrate is in a much better position than this Court for judging what would be the proper amount of security, which must vary with the danger to be apprehended and the

\* *Vide* I. L. R., 1, All. Series, p. 129.

† *Vide* I. L. R., 2, Calcutta Series, p. 110

means of the parties. But the Magistrate cannot make an order that is altogether unreasonable. Here the Magistrate, although there has been as yet no breach of the peace, and apparently no very strong determination to the resort to violence, has required the parties to enter into bonds amounting altogether to upwards of Rs. 60,000. The parties do not appear to be wealthy; and had the security ordered been really required, in all probability it could not have been furnished. We find, however, that one of the parties, who has been accepted as surety for Rs. 5,000, is described as a *kotwal* and another as a *mookhtear*, and all the bonds were executed on the very day the order was made. It would thus appear as if the amounts mentioned in the bond are merely nominal, and that no real security to that extent was required.

I consider that in this case, the Joint Magistrate has not done that which the law requires. Either he has wholly failed to exercise the discretion which the law requires him to exercise in taking security for good behaviour, or, if he has exercised it at all, he has exercised it in a manner which is altogether unreasonable. Whichever be the case, I do not think we ought to allow such an order to stand.

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## BOMBAY HIGH COURT.

*The 7th September, 1876.*

PRESENT:

Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

REG. *vs.* SAMBHU RAGHU.\*

*The Indian Penal Code (Act XLV. of 1860, Section 494)—Bigamy—  
Authority of caste to declare a marriage void.*

Courts of law will not recognize the authority of a caste to declare a marriage void, or to give permission to a woman to re-marry.

➤ *Bona fide* belief that the consent of the caste made the second marriage valid does not constitute a defence to a charge, under Section 494 of the Indian Penal Code, of marrying again during the life-time of the first husband, or to a charge of abetment of that offence under that section combined with Section 109.

• PER CURIAM:—The Acting Session Judge has considered this case very carefully, and the Court agrees in his conclusion. The Court does not find it established that there is any valid custom by which a woman of the caste of the first accused can claim a right to marry again, be-

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\* *Vide* I. L. R., 1, Bom. Series, p. 347.

cause her husband is a leper, and without having obtained a release from him. The Court does not recognize the authority of the caste to declare a marriage void, or to give permission to a woman to re-marry. The wife in this case, and the appellant, who performed the ceremony of re-marriage, probably acted in a *bond-fide* belief that the consent of the caste made the second marriage valid ; but though that circumstance may be taken into account in mitigation of punishment, it does not constitute a defence to a charge under Section 494 of the Indian Penal Code, or under that section combined with section 109 of the Code. The Court confirms the conviction ; but, as the appellant has already undergone imprisonment for 25 days, it remits the remainder of his sentence.

### LEASES,—STAMP AND REGISTRATION.

*From 1st May 1814 to January 1825.*

		Amount of Duty.
Under Beng. Regulation I. of 1814. s. 11.	If the instrument be for a sum not exceeding 16 rupees, or if the value of the property affected by it shall not exceed Rs. 16	Rs. As. P.
	If above Rs. 16 and not exceeding Rs. 64	0 1 0
	Do. 64 Do. 125	0 2 0
	Do. 125 Do. 250	0 4 0
	Do. 250 Do. 500	0 8 0
	Do. 500 Do. 1,000	1 0 0
	Do. 1,000 Do. 2,000	2 0 0
	Do. 2,000 Do. 5,000	4 0 0
	Do. 5,000 Do. 10,000	8 0 0
	Do. 10,000 Do. 20,000	16 0 0
	Do. 20,000 Do. 50,000	32 0 0
	Do. 50,000 Do. 1,00,000	50 0 0
	If above one lac of rupees	100 0 0
	Every lease and its counterpart is required to be written on paper bearing the prescribed stamp, supposing that such lease or other instrument relate to lands held exempt from the payment of revenue to Government ; but instruments relating to lands subject to the payment of revenue to Government, need not be written on stamp paper.	150 0 0



*From January 1825 to 16th June 1829.*

Under Beng. Reg. XVI. of 1824.

Any lease made in perpetuity, or for a term of years or period determinable with one or more lives, or otherwise contingent in consideration of a sum of money paid in the way of premium, fine, or the like, if without rent.

The same duty as for a conveyance, or sale for a sum of the amount of such consideration.

(*Vide 5, Legal Companion, 17.*)

Any lease of lands, houses, or other real property, at a yearly rent without any payment of any sum of money, by way of fine or premium.

Where the yearly rent shall exceed 12 rupees, but shall not exceed 21 rupees

Exceeding 24 rupees, but not exceeding 50 rupees

" 50	" 100
" 100	" 250
" 250	" 500
" 500	" 1,000
" 1,000	" 2,000
" 2,000	" 4,000
" 4,000	" 6,000
" 6,000	" 10,000
" 10,000	" 50,000

Above 50,000

Rs.	As.	P.
0	8	0
0	12	0
1	0	0
2	0	0
4	0	0
8	0	0
12	0	0
16	0	0
20	0	0
32	0	0
64	0	0
80	9	0

Any lease of lands, houses, or other real property, stipulating for a yearly rent, and granted in consideration of a fine or premium,

Shall be charged with both *ad valorem* duties above provided.

The counterpart of any lease charged with a duty exceeding 8 rupees, shall likewise be executed on paper, vellum, or parchment bearing a stamp of ...

4 0 0

#### EXEMPTIONS.

All leases or pottahs, when the annual rent shall not exceed 12 Rs.

All leases or pottahs given by the authority of Government or of the Board of Revenue, or other authority exercising the powers of that Board, and of the Court of Wards; pottahs, cobooleuts, and other instruments of contract relating to the rent of land executed between any zemindar, talookdar, farmer, or other sudder malguzar, or any holder or proprietor of land exempt from the payment of revenue, or any mofussil talookdar, ijardar, kutkenadar, or other leaseholder, or the gomastha, factor, or other agent of such zemindar or other person aforesaid on the one part, and a ryot or other actual cultivator on the other, for the land tilled by him.

NOTE.—All leases, pottahs, cobooleuts, or other similar instruments of contract between zemindars, talookdars, or other holders or proprietors of land, whether subject to the payment of revenue to Government or otherwise, farmers, kutkenadars, ijardars, or other tenants, and any other talookdar, kutkenadar, ijardar, or other leaseholder, intermediate between the ryots or actual cultivators, and the sudder malguzar, or lakherajdar, shall be written on stamp paper of the value above prescribed.

From 16th June 1829 to 30th September 1860.

Any lease made in perpetuity, or for a term of years or period determinable with one or more lives, or otherwise contingent, in consideration of a sum of money paid in the way of premium, fine, or the like, if without rent.

The same duty as for a conveyance or sale for a sum of the amount of such consideration.

Vide 5, Legal Companion, p. 17.

Any lease of lands houses, or other real property at a monthly or yearly rent, without any payment of any sum of money by way of fine or premium.

For a period not exceeding one year.	For a period exceeding one year.
Sa. Rs. A.	Sa. Rs. A.

Where the rent calculated for a whole year shall exceed 12 rupees, but not 24

Rs.	...	...	...	0	4	0	8
Exceeding 24 Rs. but not exceeding Rs. 50,	...	...	...	0	8	0	12
50	"	100	0	12	1	0	0
100	"	250	1	0	2	0	0
250	"	500	2	0	4	0	0
500	"	1,000	4	0	8	0	0
1,000	"	2,000	8	0	12	0	0
2,000	"	4,000	12	0	16	0	0
4,000	"	6,000	16	0	20	0	0
6,000	"	10,000	20	0	32	0	0
10,000	"	50,000	32	0	64	0	0
Above 50,000	"		64	0	80	0	0

Any lease of lands. houses. or other real property stipulating for a yearly rent, and granted in consideration of a fine or premium.

Shall be charged with a duty equal to both *ad valorem* duties above provided, viz., both as lease and conveyance.

The counterpart of any lease, i. e., the kubooleut, or the like.

Shall be executed on paper, vellum, or parchment, bearing the same stamp as the original.

### EXEMPTIONS.

All leases, where the annual rent shall not exceed 12 rupees.

All leases, or pottahs given by authority of Government, or of the Board of Revenue, with their counterparts, and all security bonds, executed as part of the same transactions; also all leases, viz., pottahs

and kubooleuts, executed and exchanged with ryots, and other actual cultivators of the soil.

*Note.*—Leases, pottahs kubooleuts, or other instruments of contract between zemindars, talookdars or other holders or proprietors of land whether subject to the payment of revenue to Government or otherwise, or between farmers, kutkenadars, ijardars, or other tenants, on one hand, and any other talookdar, kutkenadar, ijadar, or other lease holder, intermediate between the ryots or actual cultivators and the sudder malgoozar or lakherajdar, on the other.

Shall be written on stamp paper of the value above prescribed for leases

*From 1st October 1860 to 31st December 1869.*

Under Act XXXVI. of 1860 as well as under Act X of 1862.

Any lease made in perpetuity, or for a term of years, or period determinable within one or more lives, or otherwise contingent, in consideration of a sum of money paid in the way of premium, fine, or the like, if without rent.

The same Stamp as for a Conveyance or Deed of Sale for a sum of the amount of such consideration.

(Vide 5, Legal Companion, p. 17)

Any lease of lands, houses, or other real property at a rent, without any payment of any sum of money by way of fine or premium—

When the lease is for a period not exceeding one year.	When the lease is for a period exceeding one year
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Where the rent calculated for a whole year shall not exceed Rs 24	Rs	As.	Rs	As.
Exceeding Rs. 24 but not exceeding Rs 50	0	4	0	8
50	0	8	0	12
100	0	12	1	0
250	1	0	2	0
500	2	0	4	0
1,000	4	0	8	0
2,000	8	0	16	0
4,000	16	0	32	0
6,000	24	0	48	0
10,000	40	0	80	0
25,000	100	0	200	0
50,000	200	0	400	0
And for every additional 25,000 or part thereof	100	0	200	0

Any lease of lands, houses, or other real property at a rent for an indefinite term and without any payment of any sum of money by way of fine or premium.

The same Stamp as for a lease for a period exceeding one year.

Under Act XXXVI. of 1860,  
as well as under Act X. of 1862.

Any lease of lands, houses, or other real property, stipulating for a rent, and granted in consideration of a fine or premium.

The counterpart of any lease, or a kuboolent or the like.

A Stamp of value equal to the joint values of the Stamps for a Conveyance in consideration of the fine, and a lease for the rent.

The same Stamp as for the lease.

### EXEMPTIONS.

All Leases, Pottahs, and Kuboolents executed and exchanged with ryots, and other actual cultivators of the soil, provided that no fine or premium be paid [and no Security Bonds executed as part of the same transactions.]\*

(FOR MADRAS AND BOMBAY.)

Every Lease and its counterpart (Pottah and Kuboolent) or other engagement contracted between landlord and tenant, relative to lands subject to the payment of Revenue to Government.

*From January, 1870.*

Under Act  
XVIII. of  
1869.

(a) Where the lease is expressed to be for a term of less than one year.

(b) Where the lease is expressed to be for a term of not less than one year but not more than three years.

(c) Where the lease is expressed to be for a term exceeding three years, or where no term is expressed.

(d) Where the lease is granted in consideration of a fine or premium and where no rent is reserved.

(e) Where the lease is granted in consideration of a fine or premium and also of a rent.

The Stamp duty with which a Bond† for the total amount payable under such lease is chargeable.

The Stamp duty with which a Bond for the total amount payable under such lease during the first year of the term is chargeable.

The Stamp duty with which a conveyance for the total amount payable under such lease during the first year of the term is chargeable.

The Stamp duty with which a conveyance for the amount so paid is chargeable.

The Stamp duty with which a conveyance for the amount of the fine or premium is chargeable, in addition to the stamp-duty with which the lease would be chargeable in case no such fine or premium had been paid.

### Surrender of Lease.

(a) Where the amount of Stamp duty chargeable on the lease does not exceed Rs. 16.

(b) In any other case. ...  
Counterpart of a lease or kaboolent.

The Stamp duty with which the lease is chargeable.

Sixteen Rupees.

One Rupee.

\* This portion is omitted in Act X. of 1862.

† Vide the following page.

*Bond.*

	Rs.	As.	P.
When the amount secured does not exceed Rs. 25, ...	0	2	0
When such amount exceeds Rs. 25, but does not exceed			
Rs. 50, ...	0	4	0
When such amount exceeds Rs. 50, but does not exceed			
Rs. 100, ...	0	8	0
For every Rs. 100 or part thereof in excess of Rs. 100			
up to Rs. 1,000, ...	0	8	0
For every Rs. 500 or part thereof in excess of Rs. 1,000			
up to Rs. 10,000, ...	2	8	0
For every Rs. 1,000 or part thereof in excess of Rs. 10,000			
up to Rs. 30,000, ...	2	8	0
And for every Rs. 10,000 or part thereof in excess of			
Rs. 30,000, ...	12	8	0

The registration of leases for a period exceeding one year, was made compulsory by S. 13 of Act XVI. of 1864, which came into operation from the 1st January 1865, in the Presidencies of Bengal, Madras and Bombay, as well as by S. 17 of Act XX. of 1866, S. 17 of Act VIII. of 1871, and S. 17 of Act III. of 1877. Excepting Act XVI. of 1864, the rest of the above-mentioned Registration Acts provide that a lease includes a counterpart or a kabuleut.

## A CHAPTER FROM THE (NEW CIVIL) PROCEDURE CODE (ACT X. OF 1877.)

### CHAPTER II.

#### OF THE PLACE OF SUING.

Court in which suit to  
be instituted.

15. Every suit shall be instituted in the Court  
of the lowest grade competent to try it.

#### *Notes.*

This section is a mere reproduction of the first line of Section 6 of Act VIII of 1859.

The amount which is sued for determines the jurisdiction, and not the sum which may eventually, after investigation, be found due to the plaintiff. (Agra 1856, p. 161.)

*Suits to be instituted where subject-matter situate.*

16. Subject to the pecuniary or other limitations prescribed by any law, suits

- (a) for the recovery of immoveable property,
- (b) for the partition of immoveable property,
- (c) for the foreclosure or redemption of a mortgage of immoveable property,
- (d) for the determination of any other right to or interest to or in immoveable property,
- (e) for compensation for wrong to immoveable property,
- (f) for the recovery of moveable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate :

Provided that suits to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, when the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction he actually and voluntarily resides, or carries on business, or personally works for gain.

*Explanation.*—In this section ‘property’ means property situate in British India.

#### *Notes.*

This section corresponds with Section 5 of Act VIII. of 1859. It specifies the suits whose forum is fixed with reference to the situation of the subject-matter. Such are suits relating to immoveable property and suits for moveables which have been distrained or attached. It also provides for the venue of suits for compensation for wrongs to immoveable property or to obtain relief respecting land where (as in the case of specific performance of a contract of sale) the relief sought can be obtained through the personal obedience of the defendant. Such suits may be brought either in the Court which has jurisdiction over the land or in the Court which has jurisdiction over the person of the defendant.—*Vide* New York Civil Procedure Code, S. 123.

An objection to jurisdiction cannot be waived by the parties.—1, *In. Jur.*, N. S., p. 319 ; 14, *W. R.*, p. 228.

As regards “actually and voluntarily residing,” “carrying on business” and “personally working for gain” see notes under S. 17 of this Act.

In a case, the plaintiffs, *i. e.*, the owners and occupiers of a house and premises, sued for an injunction to restrain a nuisance caused by certain workshops, forges,

and furnaces erected by the defendants, and for damages for the injury done thereby. *Held*, that the suit was *in personam*, and not a suit "for land or other immoveable property" within the meaning of s. 5 of Act VIII. of 1859.—(10, B. L. R., p. 241.)

Although the Court has no jurisdiction over land or other immoveable property situate beyond the limits of its local jurisdiction, and can make no adjudication as to the right and title to such land, yet, where a party is *personally subject* to the jurisdiction, the Court has power to declare whether or not such party holds such lands subject to a trust.—1, Hyde, 284.

And so a suit may be brought in the Court, in the jurisdiction of which *the defendant is residing*, to recover the rents of land situated out of the Court's jurisdiction, although in such suit the plaintiff's title to the land, of which the rent is sought to be recovered, may incidentally come in question, as the suit itself is not for the land.—6, Bom. H. O. Rep. (A. C.) 29.

A suit brought upon a mortgage praying for a decree for the amount due thereunder, and that in default of payment the land mortgaged may be sold, is a suit for land within the meaning of s. 5 of Act VIII. of 1859.—(9, B. L. R. p. 171.)

Suits to be instituted where defendants reside or cause of action arose.

17. Subject to the limitations aforesaid, all other suits shall be instituted in a Court within the local limits of whose jurisdiction—

- (a) the cause of action arises, or
- (b) all the defendants, at the time of the commencement of the suit, actually and voluntarily reside, or carry on business, or personally work for gain; or
- (c) any of the defendants, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain: provided that either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain as aforesaid acquiesce in such institution.

*Explanation I.*—Where a person has a permanent dwelling at one place and also a lodging at another place for a temporary purpose only, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary lodging.—[*Vide* Pollock, 53.—Ed. L. C.]

*Explanation II.*—A Corporation or Company shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.—[*Vide* Pollock, 53.—Ed. L. C.]

### *Illustrations.*

(a.) A is a tradesman in Calcutta. B carries on business in Dehli. B, by his agent in Calcutta, buys goods of A, and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen, or in Dehli, where B carries on business.—[*Vide* 1, *Mad*, 200 — *Ed*, *L. C.*]

(b.) A resides at Simla, B at Calcutta, and C at Dehli. A, B and C being together at Benares, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Benares, where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Dehli, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot be maintained without the leave of the Court.—[*Vide* 3, *Mad*, 397.—*Ed*, *L. C.*]

### *Notes.*

This section corresponds with s. 5 of Act VIII. of 1859 and s. 4 of Act XXIII. of 1861. It deals with the suits to be instituted where the defendant resides, or where the cause of action arose. The Select Committee in their report says: "The principal changes which we have made are these:—Where there are several defendants, only some of whom reside, &c., within the local limits of the Court's jurisdiction, we think that the suit should not be instituted in the Court unless either (a) the leave of the Court is given, or (b) the non-residents acquiesce.

When a person residing at Benares made an agreement at Allahabad with a barrister to conduct his case for him, which was then pending in the Court of the Judge of Benares, and it was alleged that an advance of fees had been paid on the specific condition that such advance was to be returned in the event of the barrister not appearing on behalf of the party engaging him, or of his doing no work for him, or of the case being decided in his absence, and it was further alleged that the barrister did not appear at the hearing of the case, and that it was decided in his absence, and that the advance of fees had not been returned. *Held*, in a suit for the recovery of the monies advanced as aforesaid that the cause of action arose at Benares. If the alleged condition was not complied with, and the fees thereby became returnable to the client, it would have been the duty of the barrister to have sought out his creditor at Benares and to have paid him there or have remitted the money to him. (*Semble*.—That a member of the Bar of the High Court residing out of the station in which the High Court is located, but who holds him self out as ready to practice in the High Court, and who goes to the High Court, whenever he is engaged to appear there, is one "who personally works for gain" inside of the limits of the station in which the High Court is located within the meaning of s. 5, Act VIII. of 1859.—(6, *N. W. P. High Court Reports*, p. 43.)

"*Cause of Action*."—In the case of *DeSouza vs. Coles*, 3, *Mad. H. C. Rep.*, 384, this head of jurisdiction was discussed at great length by Sir A. Bittleston.

The High Court (*N. W. P.*) has held that the cause of action arises "where the facts that immediately cause the right to sue have accrued," and that the non-payment of the amount of a bond is a circumstance that would immediately confer the right to sue, and the Court of the place where default is made in payment has



jurisdiction, and not the Court where the bond was executed.—(Full Bench,) 4, H. C. Rep., Agra, 492.

"In one sense it is frequently said that every injury is a cause of action, but no one would suppose it to be sufficient for the plaintiff to state that the defendant had done him an injury, and upon that sole allegation call upon the Court to try a suit. What I understand that a plaintiff is bound to do, is to shew the Court that he relies upon facts, which, if established by proof, will entitle him to the compensation or the relief asked for. If compensation for an injury be the object of the suit, then he must shew the nature of the particular injury complained of and what he claims for compensation; if the object be to compel the defendant to perform some duty, then he must shew the nature of the duty, and the origin of the defendant's liability to perform it, if to recover damages for a breach of contract, then he must state the nature of the contract, how the defendant undertook the performance of it, and how he failed in carrying it out. And I apprehend that, when it is said that the plaintiff must show a *cause of action*, it is meant that he must shew some such facts as these, so that the Court may see whether even in his own statements, he really has, or has not any substantial ground for bringing the suit" *per* Markby, J.—[2, In. Jur., (N. S.) 336.]

Where the plaintiff brought an action to recover money paid by him in Calcutta on hoondees drawn by the defendant beyond the local limits, but sent by him to Calcutta, and there accepted by the plaintiff, *held*, that the whole cause of action arose within the local limits of the Calcutta Court so as to give it jurisdiction within this section.—1, In. Jur. (N. S.) 219.

Where A, out of the local limits, drew hoondees on B living within them, against goods to be sent to and sold by B within the same limits, and where these hoondees were negotiated in the ordinary way, *held*, that the whole cause of action, in a suit on the balance of account between the parties, arose within the local limits.—[1, B. L. R., (O. J.) 76.]

The defendant at A, agreed to sell and deliver goods to the plaintiff, the goods to be measured at B, and delivered at C. In default of delivery, the value of the goods should be paid at the market price at A. Default was made. *Held*, in an action to recover the value of the goods at the market rate at A, that the cause of action arose at C. (5, Bom. H. C. Rep. 33.)

A contract is considered to have been made, not where a letter containing an offer has been posted, but where the offer has been received and accepted, not where a treaty has been carried on, and the terms have been discussed and all but settled, but where they are finally assented to by the parties. (3, Mad., 384; 4, Mad. 218.)

"*Actually and Voluntarily residing.*"—Where a man was temporarily imprisoned beyond the Court's jurisdiction, but had his fixed residence and his wife and family within it, *held*, that he was within the jurisdiction for the purpose of a suit under Act XI. of 1865, (7. W. R., p. 349.)

The fixed and permanent home of a man's wife and family, and to which he has always the intention of returning, will constitute his dwelling place within the

meaning of s. 5 of Act VIII. of 1859 and s. 4 of Act XXIII. of 1861. (1. L. R., 1, All. Series, p. 51 and 4. Legal Companion, p. 51.)

The word "dwelling" is synonymous with "place of abode" or "residence"; it is the domicile or home. (1, L. R., Ex., 133; 15, L. J. Ex., 287.)

Mr. Mosely, in his book on County Courts, lays down the following rules regarding the word "dwell"—

1. Sleeping is the chief test of a dwelling.
2. The dwelling must be by consent.
3. It must be with the intention of continuing.
4. It must be an actual dwelling.
5. The sort of habitation is immaterial.

Mere casual presence, or even residence for a temporary purpose, without the intention of remaining, is not "dwelling." A person resided at Coimbatore, but had some cultivation within the local jurisdiction of Ootacamund, to which he came to answer another demand against him; *held*, that he did not "dwell" within the jurisdiction of the Ootacamund Small Cause Court. (2, Madr., 304.)

Where an Officer in the Bombay Staff Corps, holding an appointment in Scinde, came to Bombay on leave for 10 days, and during his stay was served with a writ of summons in an action, the cause of which had arisen in Scinde, it was *held* that he did not "dwell" in Bombay, within the terms of s. 12 of the Charter (1, Bom. H. C. Rep., p. 113)

The word "dwell" cannot be considered applicable to suits against Government, or at all events no distinction can be made between dwelling and carrying on business; for if the Government can be said to dwell any where, it must be in the place where the business of Government is carried on. (1, Madr., 286.)

Where the defendant's permanent dwelling was at Benares, but he had gone to Mirzapore before the institution of the suit for a temporary purpose only, it was *held* the Benares Small Cause Court had jurisdiction. (3, All., 121.)

"*Carrying on Business.*"—Where a person who owned a house in Calcutta, which he let to another person, was in the habit of coming once or twice a week as a friend of his tenant, and saw people on business, it was *held* that he carried on business, or worked for gain, within the local limits of the High Court. (2, Hyde, p. 79.)

An individual, or a trading firm, is said to "carry on business" at the head office at which the business is managed. The individual or company does not carry on business at every place at which he or it does business. A builder whose place of business is in one district may undertake extensive works in another district, and visit them frequently; or a wholesale dealer who has a fixed place of business in X., where he sells his goods, may likewise employ travellers who visit different parts of the country, making contracts, and selling goods for him, and also collecting money; yet the builder or trader do not, in the sense of the Letters Patent, "carry on business" elsewhere than at their own permanent places. (30, L. J. Q. B., 331.)

"*Personally working for gain.*"—No remark is necessary.

18. In suits for compensation for wrong done to person or moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain within the local limits of the jurisdiction of another Court, the plaintiff may at his option sue in either of the said Courts.

*Illustrations.*

(a) A, residing in Dehli, beats B in Calcutta. B may sue A either in Calcutta or in Dehli.

(b) A, residing in Dehli, publishes in Calcutta statements defamatory of B. B may sue A either in Calcutta or in Dehli.

(c) A, travelling on the line of a Railway Company whose principal office is at Howrah, is upset and injured at Allahabad by negligence imputable to the Company. He may sue the Company either at Howrah or at Allahabad.

*Note.*

This section declares that suits for actionable wrongs may be brought either where the wrong is committed or where the defendant resides.

19. If the suit be to obtain relief respecting, or compensation for wrong to, immoveable property situate within the limits of a single district, but within the jurisdiction of different Courts, the suit may be instituted in the Court within whose jurisdiction any portion of the property is situate; provided that, in respect of the value of the subject-matter of the suit, the entire claim be cognizable by such Court.

If the immoveable property be situate within the limits of different districts, the suit may be instituted in any Court, otherwise competent to try it, within whose jurisdiction any portion of the property is situate.

*Note.*

This section corresponds with s. 11 of Act VIII of 1859; but no longer any sanction is necessary to proceed with the trial of a suit for immoveable property situate within different jurisdictions of the same District or different Districts.

20. If a suit which may be instituted in more than one Court is instituted in a Court within the local limits, of whose jurisdiction the defendant or all the defendants does not or do not actually and voluntarily reside, or carry on business, or personally work for gain, the defendant or any defendant may, after giving notice in writing to the other parties of his intention to apply to the Court to stay proceedings, apply to the Court accordingly;

and if the Court, after hearing such of the parties as desire to be heard, is satisfied that justice is more likely to be done by the suit being instituted in some other Court, it may stay proceedings either finally or till further order, and make such order as it thinks fit as to the costs already incurred by the parties or any of them.

In such case, if the plaintiff so requires, the Court shall return the plaint with an endorsement thereon of the order staying proceedings.

Every such application shall be made at the earliest possible opportunity, and in all cases before the issues are settled; and any defendant not so applying shall be deemed to have acquiesced in the institution of the suit.

Application when to be made.

#### *Note.*

This section provides that if the Court thinks that justice is more likely to be done by the suit being instituted in another Court, it may stay proceedings, on the application of any defendant, either finally or till further orders.

21. Where the Court, under section 20, stays proceedings, and the plaintiff re-institutes his suit in another Court, the plaint shall not be chargeable with any court-fee; provided that the proper fee has been levied on the institution of the suit in the former Court, and that the plaint has been returned by such Court.

Remission of court-fee where suit instituted in another Court.

#### *Note.*

No remark necessary.

22. Where a suit may be instituted in more Courts than one, and such Courts are subordinate to the same appellate Court, any defendant, after giving notice in writing to the other parties of his intention to apply to such Court to transfer the suit to another Court, may apply accordingly; and the appellate Court, after hearing the other parties, if they desire to be heard, shall determine in which of the Courts having jurisdiction the suit shall proceed.

Procedure where Courts in which suit may be instituted are subordinate to the same appellate Court.

#### *Note.*

No remark necessary.

23. Where such Courts are subordinate to different appellate Courts, but are subordinate to the same High Court, any defendant, after giving notice in writing to the other parties of his intention to apply to the High Court to transfer the suit to another Court having jurisdiction, may apply accordingly. If the suit is brought in any Court subordinate to a District Court, the application, together with the objec-

Procedure where they are not so subordinate.

tions, if any, filed by the other parties, shall be submitted through the District Court to which such Court is subordinate. The High Court may, after considering the objections, if any, of the other parties, determine in which of the Courts having jurisdiction the suit shall proceed.

*Note.*

*Vide* s. 12 of Act VIII. of 1859.

24. Where such Courts are subordinate to different High Courts, any defendant may, after giving notice in writing to the other parties of his intention to apply to the High Court within whose jurisdiction the Court in which the suit is brought is situate, apply accordingly.

*Procedure where they are subordinate to different High Courts.*

If the suit is brought in any Court subordinate to a District Court, the application, together with the objections, if any, filed by the other parties, shall be submitted through the District Court to which such Court is subordinate,

and such High Court shall, after considering the objections, if any, of the other parties, determine in which of the several Courts having jurisdiction the suit shall proceed.

*Note.*

*Vide* s. 13 of Act VIII. of 1859.

25. The High Court or District Court may, on the application of any of the parties, after giving notice to the parties and hearing such of them as desire to be heard, or of its own motion, without giving such notice, withdraw any suit whether pending in a Court of first instance or in a Court of appeal subordinate to such High Court or District Court, as the case may be, and try the suit itself, or transfer it for trial to any other such subordinate Court competent to try the same in respect of its nature and the amount or value of its subject-matter.

*Transfer of suits.*

For the purposes of this section, the Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

The Court trying any suit withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

*Note.*

Corresponds with s. 6 of Act VIII. of 1859. A suit cannot be transferred after evidence has been taken. (Sutherland's Rep., Special Number, 1864, p. 15, and 2, *ALL. H. C. Rep.*, p. 231); but this objection may be waived by the parties.—(4, *Bom. H. C. Rep.*, p. 98.)

## EXAMINATIONS FOR THE CIVIL SERVICE OF INDIA.

## REGULATIONS FOR THE OPEN COMPETITION OF 1877.

*N. B.—The Regulations are liable to be altered in future years.*

1. On March 20th, 1877, and following days, an examination of candidates will be held in London. At this examination not fewer than                      candidates will be selected, if so many shall be found duly qualified. Of these,                      will be selected for the Presidency of Bengal [                      for the Upper Provinces and                      for the Lower Provinces],                      for that of Madras, and                      for that of Bombay.\*—Notice will hereafter be given of the days and place of examination.

2. Any person desirous of competing at this examination must produce to the Civil Service Commissioners, before the 1st of February 1877, evidence showing—

- (a) That he is a natural-born subject of Her Majesty.
- (b) That his age on the 1st March 1877 will be above seventeen years and under twenty-one years. [*N. B.—In the case of Natives of India this must be certified by the Government of India, or of the presidency or province in which the candidate may have resided.*]
- (c) That he has no disease, constitutional affection, or bodily infirmity unfitting him, or likely to unfit him, for the Civil Service of India.†
- (d) That he is of good moral character.

He must also pay such fee as the Secretary of State for India may prescribe.‡

3. Should the evidence upon the above points be *prima facie* satisfactory to the Civil Service Commissioners, the candidate will, upon payment of the prescribed fee, be admitted to the examination. The Commissioners may, however, in their discretion, at any time prior to the grant of the Certificate of Qualification hereinafter referred to, insti-

\* The number of appointments to be made, and the number in each presidency, &c., will be announced hereafter.

† Evidence of health and character must bear date not earlier than the 1st January 1877.

‡ The fee for this examination will be £5, payable by means of a special stamp according to instructions which will be communicated to candidates.

tute such further inquiries as they may deem necessary; and if the result of such inquiries, in the case of any candidate, should be unsatisfactory to them in any of the above respects, he will be ineligible for admission to the Civil Service of India, and if already selected, will be removed from the position of a probationer.

4. The examination will take place only in the following branches of knowledge :—

	Marks.
English Composition, ... ..	500
History of England—including that of the Laws and Constitution, ... ..	500
English Language and Literature, ... ..	500
Language, Literature, and History of Greece, ... ..	750
„ „ „ Rome, ... ..	750
„ „ „ France, ... ..	375
„ „ „ Germany, ... ..	375
„ „ „ Italy, ... ..	375
Mathematics (pure and mixed), ... ..	1,250
Natural Science : that is (1) Chemistry, including Heat ; 2) Electricity and Magnetism ; (3) Geology and Mineralogy ; (4) Zoology ; (5) Botany, ... ..	1,000
* * * The total (1,000) marks may be obtained by adequate proficiency in any two or more of the five branches of science included under this head.	
Moral Sciences : that is, Logic, Mental and Moral Philosophy, ... ..	500
Sanskrit Language and Literature, ... ..	500
Arabic Language and Literature, ... ..	500

Candidates are at liberty to name, before February 1, 1877, any or all of these branches of knowledge. No subjects are *obligatory*.

5. The merit of the persons examined will be estimated by marks ; and the number set opposite to each branch in the preceding regulation denotes the greatest number of marks that can be obtained in respect of it.

6. No candidate will be allowed any marks in respect of any subject of examination unless he shall be considered to possess a *competent knowledge* of that subject.\*

\* “Nothing can be further from our wish than to hold out premiums for knowledge of wide surface and of small depth. We are of opinion that a candidate ought to be allowed no credit at all for taking up a subject in which he is a mere smatterer.”—Report of Committee of 1854. A deduction of marks will be made under each subject, including *Mathematics*.

7. The examination will be conducted by means of printed questions and written answers, and by *visà voce* examination, as may be deemed necessary.

8. The marks obtained by each candidate in respect of each of the subjects in which he shall have been examined will be added up, and the names of the candidates who shall have obtained a greater aggregate number of marks than any of the remaining candidates will be set forth in order of merit, and such candidates shall be deemed to be selected candidates for the Civil Service of India, provided they appear to be in other respects duly qualified. Should any of the selected candidates become disqualified, the Secretary of State for India will determine whether the vacancy thus created shall be filled up or not. In the former case the candidate next in order of merit and in other respects duly qualified shall be deemed to be a selected candidate. A selected candidate declining to accept the appointment which may be offered to him will be disqualified for any subsequent competition.

9. Selected candidates before proceeding to India will be on probation for two years, during which time they will be examined periodically, with a view of testing their progress in the following subjects\* :—

	Marks.
1. Oriental Languages—	
Sanskrit ... ..	500
Vernacular† Languages of India (each) ...	400
2. The History and Geography of India ...	350
3. Law ... ..	1,250
4. Political Economy ... ..	350

In these examinations, as in the open competition, the merit of the candidates examined will be estimated by marks, and the number set opposite to each subject denotes the greatest number of marks that can be obtained in respect of it at any one examination. The examination will be conducted by means of printed questions, and written answers, and by *visà voce* examination, as may be deemed necessary. The last of these examinations will be held at the close of the second year of probation, and will be called the “final examination,” at which it will be

\* Full instructions as to the course of study to be pursued will be issued to the successful candidates as soon as possible after the result of the open competition is declared.

† Including, besides the languages prescribed for the several presidencies, such other languages as may, with the approval of the Commissioners, be taken up as subjects of examination.



decided whether a selected candidate is qualified for the Civil Service of India.

10. Any candidate who, at any of the periodical examinations, shall appear to have wilfully neglected his studies, or to be physically incapacitated for pursuing the prescribed course of training, will be liable to have his name removed from the list of selected candidates.

11. The selected candidates who, at the final examination, shall be found to have a competent knowledge of the subjects specified in Regulation IX., and who shall have satisfied the Civil Service Commissioners of their eligibility in respect of age, health, and character, shall be certified by the said Commissioners to be entitled to be appointed to the Civil Service of India, provided they shall comply with the Regulations in force at the time for that Service.

12. Applications from persons desirous to be admitted as candidates are to be addressed to the Secretary to the Civil Service Commissioners, London, S. W., from whom the proper form for the purpose may be obtained.

4th August 1876.

THE Civil Service Commissioners are authorised by the Secretary of State for India in Council to make the following announcements :—

(1.) *Selected candidates will be permitted to choose,\* according to the order in which they stand in the list resulting from the open competition as long as a choice remains, the Presidency (and in Bengal the Division of the Presidency) to which they shall be appointed; but this choice will be subject to a different arrangement should the Secretary of State or Government of India deem it necessary.*

(2.) *No candidate will be permitted to proceed to India before he shall have passed the final examination and received a Certificate of Qualification from the Civil Service Commissioners, or after he shall have attained the age of twenty-four years.*

(3.) *The seniority in the Civil Service of India of the selected candidates shall be determined according to the order in which they stand on the list resulting from the Final Examination.*

(4.) *It is the intention of the Secretary of State to allow the sum of £50 after each of the three first half years of probation, and £150 after the last half year to each selected candidate who shall have passed the re-*

\* This choice must be exercised immediately after the result of the open competition is announced, on such day as may be fixed by the Civil Service Commissioners.

*quired examinations to the satisfaction of the Commissioners, and shall have complied with such rules as may be laid down for the guidance of selected candidates.*

(5.) *All selected candidates will be required, after having passed the second periodical examination, to attend at the India Office for the purpose of entering into an agreement binding themselves, amongst other things, to refund in certain cases the amount of their allowance in the event of their failing to proceed to India. For a candidate under age a surety will be required.*

(6.) *After passing the final examination, each candidate will be required to attend again at the India Office, with the view of entering into covenants. The stamps payable on these documents amount to £1.*

(7.) *Candidates rejected at the final examination of 1879 will in no case be allowed to present themselves for re-examination.*

### CIVIL SERVICE OF INDIA.

#### FORM OF APPLICATION: TO BE FILLED UP BY CANDIDATES.

*\*\* This Form must be sent so as to be received at the Office of the Civil Service Commission before the 1st of February 1877.*

*Date\_\_\_\_\_*

SIR,

I BEG to inform you that I desire to be a candidate at the forthcoming examination for the Civil Service of India.

As required by the Regulations, I transmit herewith—

(1) A certificate of my birth, showing that I was born on the

(1) If a General Register Office certificate cannot be obtained, the instructions printed on the other side will show what evidence should be supplied. If evidence is already in the hands of the Commissioners, strike out "A certificate of my birth," and insert "Evidence is already in the possession of the Commissioners."

day of  
18 , and that therefore  
my age on March 1,  
1877, will be above 17  
years (complete) and under 21 years.

(2) A certificate signed by

(2) The terms indicated by the marks of quotation must appear in the certificate, which must be given after personal examination, and bear date not earlier than 1st January 1877.

of .  
my having "no disease,  
"constitutional affection,  
"or bodily infirmity,

"unfitting me for the Civil Service of India."

(3) Two testimonials must be sent bearing date not earlier than 1st January 1877. One of them should be given by an intimate acquaintance (not a relative) of not less than three or four years' standing; the other, if the candidate has recently left school, should be given by his late schoolmaster, or if he has had employment of any kind, by his late employer. If the candidate has been at any University, he should send a certificate of good conduct from his college tutor.

(3) Proof of my moral character, viz.—

(1) A testimonial from

(2) A testimonial from

(4) If Mathematics be named, state whether pure or mixed, or both are intended; if Natural Science be mentioned, state which branches.

(4) A statement of the branches of knowledge in which I desire to be examined, viz.—

amined, viz.—

I have also to state, with reference to Section 2, Clause (a) of the Regulations, that I am a natural-born subject of Her Majesty.

I am, Sir,

Your obedient Servant,

*Name in full* \_\_\_\_\_

*Address* \_\_\_\_\_

*To the Secretary,*

*Civil Service Commission.*

## EVIDENCE OF AGE TO BE REQUIRED FROM CANDIDATES FOR THE CIVIL SERVICE OF INDIA.

I.—Every candidate born in England or Wales should produce a certificate from the Registrar-General of Births, Marriages, and Deaths, or from one of his Provincial Officers. This certificate may be obtained at Somerset House, or from the Superintendent Registrar of the district in which the birth took place.

II.—A candidate who is a Native of India must have his age certified by the Government of India, or of the presidency or province in which he may have resided.

III.—Every other candidate *not producing the Certificate mentioned in Clause I.* must prove his age by statutory declaration, and should also, if possible, produce a record of birth or baptism from some official

register; under which term may be included the parochial registers of baptisms, the non-parochial registers of baptisms and births deposited at Somerset House under Acts of Parliament, the register kept at the India Office of persons born in India, &c., &c. This Regulation applies—

- (1) To all candidates not born in England or Wales.
- (2) To candidates who, though born in England or Wales, cannot produce the Registrar-General's certificate.

The Civil Service Commissioners reserve to themselves the right of deciding in each case upon the sufficiency of the evidence produced, but they subjoin the following general rules for the guidance of candidates :—

- (a) The declaration should specify precisely the date and place of birth, and should, if possible, be made by the father or mother of the candidate. If made by any other person it should state the circumstances which enable the declarant to speak to the fact. If an entry in a Bible or other family record be referred to, the Bible or other record must be produced at the time of making the declaration, and must be mentioned in the declaration as having been so produced.
- (b) If the candidate was born in England or Wales, the declaration must contain a statement that after due inquiry no entry has been found in the books of the Registrar-General; or a separate declaration must be made to that effect.
- (c) If no extract from any register is produced, the declaration must contain a statement that after due inquiry no such record is believed to exist; or a separate declaration must be made to that effect.
- (d) Statutory declarations must be exactly in the form prescribed by the Act of 5 and 6 William IV., c. 62. A printed Form, if required, will be supplied on application to the Civil Service Commissioners.

*N.B.—Clergymen, as such, are not qualified to take declarations.*

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## AN ELEMENTARY COURSE OF LAW LECTURES.

## LECTURE IV.

*On Validity of Wills.*

The law of England, in the absence of custom, adopts the law of primogeniture as to inheritable freeholds, and a distribution among the nearest of kin as to personalty—a distinction not known in Hindu law. The only trace of religion in the history of the law of succession in England is the trust (without any beneficial interest) formerly reposed in the Church to administer personal property (*Tyler v Walford*, 5, Moore, P. C. 304). In the Hindu law of inheritance, on the contrary, the heir or heirs are selected who are most capable of exercising those religious rights which are considered to be beneficial to the deceased.

The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law.

Inheritance does not depend upon the will of the individual owner ; transfer does. Inheritance is a rule laid down (or in the case of custom recognized) by the State, not merely for the benefit of individuals, but for reasons of public policy. (Domat, 2413).

It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord Justice Turner in *Soorjomonee Dossee v. Denobundoo Mullick* (6, Moore, I. A., 555) : “ A man cannot create a new form of estate or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy.”

Another general principle applicable to transfers by gift (more liberally applied in the law of England to wills than to gifts *inter vivos*) is, that a benignant construction is to be used, and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description, or in any other manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced to the extent and in the form which the law allows.

Accordingly, if the gift confers an estate upon a man with words imperfectly describing the kind of inheritance, but showing that it was

intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs.

If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law (as under the present state of law it does by will in England) an estate of inheritance. If, there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass.

If, again the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize.

If, on the other hand, the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth, for ever to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his life-time; here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law.

This makes it necessary to consider the Hindu Law of Gifts during life and Wills, and the extent of the testator's power, whether in respect of the property he deals with or the person upon whom he confers it. The Law of Gifts during life is of the simplest character. As to ancestral estate it is said to be improper that it should be aliened by the holder, without the concurrence of those who are interested in the succession, but by the law as prevailing in Bengal at least\* the impropriety of the alienation does not affect the legal character of the act (*factum valet*), and it has long been recognized as law in Bengal that the legal power of transfer is the same as to all property, whether ancestral or

\* As to Madras see to the same effect *Valinayagam Pillai v. Pehche* 1, Madras High Court R., 326, 1, Norton L. C., 334 S. C.

acquired. It applies to all persons in existence, and capable of taking from the donor at the time when the gift is to take effect, so as to fall within the principle expressed in the *Daya Bhaga*, chapter I., v. 21, by the phrase "relinquishment in favor of the donee who is a sentient person."

By a rule now generally adopted in jurisprudence, this class would include children in embryo, who afterwards come into separate existence.

As to the case of adopted children it is distinguishable because of the peculiar law applicable to that relation. The Hindu law recognizes an adopted child, whether adopted by the father himself in his life-time, or by the person to whom he has given the power of adoption after his death from amongst those of his class, of one to stand in the place of a child actually begotten by the father. In contemplation of law such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him. Apart from this exceptional case, which serves to prove the rule, the law is plain that the donee must be a person in existence capable of taking at the time when the gift takes effect.

As to gifts by way of will, whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions both in England and in India, proceeding upon the assumption that gifts by will are legally binding, and recognizing the validity of that form of gift as part and parcel of the general law. The introduction of gifts by will into general use has followed in India, as it has done in other countries, the conveyance of property *inter vivos*. The same may be said of the Roman Law, as pointed out by Mr. E. C. Clark in his interesting treatise upon "Early Roman Law," 118, in which the testamentary power, apart from public sanction, appears to have been a development of the law of gifts *inter vivos*. Such a disposition of property, to take effect upon the death of the donor, though revocable in his life-time, is, until revocation a continuous act of gift up to the moment of death, and does then operate to give the property dis-

posed, of to the persons designated as beneficiaries. They take upon the death of the testator as they would, if he had given the property to them in his life-time. If wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred.

A person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must either in fact or in contemplation of law, be in existence at the death of the testator.

There are exceptional cases of provisions by way of contract or of conditional gift on marriage or other family provision, for which authority may be found in Hindu law or usage.

Where a Hindu testator gave all his immoveable property to his sons, but postponed their enjoyment thereof by a clause that they should not make any division for twenty years, it was held that the restriction was void as being a condition repugnant to the gift, and that the sons were entitled to partition at once. Mr. Justice Phear in delivering his judgment\* said, "I do not think it is competent to him to give the corpus of the property to an adult person and at the same time to forbid that person from enjoying the property in the way which the law allows. The prohibition against receiving and enjoying the income for twenty years, appears to me simply to be a condition imposed on the property which is repugnant to the gift. It is not merely the giving of one portion of the property to one person or purpose, and the remaining portion to another person or purpose; but it is giving the entire property to one person and coupling this gift with a prohibition against his enjoyment. The attempt to do this is I think void in law."

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\* I. L. R., 1, Calcutta Series, p. 104; 4, Legal Companion, p. 99.



## ORDER OF SUCCESSION ACCORDING TO THE SOONEE SCHOOL OF MAHOMMEDAN LAW.

### I.—Sharers.

- \* 1° FATHER. (a).—As mere *sharer*, when a son or son's son, how low soever, he takes  $\frac{1}{8}$ . (β).—As mere *residuary*, when no successor but himself, he takes the whole : or with a sharer, not a child or son's child, how low soever, he takes what is left by such sharer. (γ).—As sharer and residuary, as when there are daughters and son's daughter, but no son or son's son, he, as sharer, takes  $\frac{1}{8}$ ; daughter takes  $\frac{1}{2}$ , or two or more daughters  $\frac{2}{3}$ ; son's daughter  $\frac{1}{8}$ ; and father the remainder as residuary.
- † 2° TRUE GRANDFATHER, *i. e.*, father's father, his father and so forth, into whose line of relationship to deceased no mother enters, is excluded by father and excludes brothers and sisters; comes into father's place when no father, but does not like father reduce mother's share to  $\frac{1}{3}$  of residue, nor entirely exclude paternal grandmother.
- † 3° HALF BROTHERS BY SAME MOTHER, take, in the absence of children, or son's descendants, and father and true grandfather, one  $\frac{1}{6}$ , two or more between them  $\frac{1}{3}$ . R
- \* 4° DAUGHTERS; when no sons, take, one  $\frac{1}{2}$ ; two or more,  $\frac{2}{3}$  between them : with sons become residuaries and take each half a son's share. R
- † 5° SON'S DAUGHTERS; take as daughters, when there is no child; take nothing when there is a son or more daughters than one; take  $\frac{1}{8}$  when only one daughter; are made residuaries by brother or male cousin how low soever. R
- \* 6° MOTHER : takes  $\frac{1}{3}$ , when there is a child or son's child, how low soever, or two or more brothers or sisters of whole or half blood; takes  $\frac{1}{3}$ , when none of these : when husband or wife and both parents, takes  $\frac{1}{3}$  of remainder after deducting their shares, the residue going to father : if no father, but grandfather, takes  $\frac{1}{3}$  of the whole. R
- † 7° TRUE GRANDMOTHER, *i. e.*, father's or mother's mother, how high soever; when no mother, takes  $\frac{1}{8}$  : if more than one,  $\frac{1}{8}$  between them. Paternal grandmother is excluded by both father and mother; maternal grandmother by mother only. R

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\* Are always entitled to some shares.

† Are liable to exclusion by others who are nearer.

R Denotes those who benefit by the Return.

† 8° FULL SISTERS, take as daughters, when no children, son's children, how low soever, father, true grandfather or full brother : with full brother, take half share of male : when daughters or son's daughters, how low soever, but neither sons, nor sons' sons, nor father, nor true grandfather, nor brothers, the full sisters take as residuaries what remains after daughter or son's daughter have had their share. R

+ 9° HALF SISTERS BY SAME FATHER : as full sisters, when there are none : with one full sister, take  $\frac{1}{6}$  ; when two full sisters, take nothing, unless they have a brother who makes them residuaries, and then they take half a male's share. R

+ 10° HALF SISTERS BY MOTHER ONLY : when no children or son's children how low soever, or father or true grandfather, take, one  $\frac{1}{6}$  ; two or more  $\frac{1}{3}$  between them. R

\* 11° HUSBAND : if no child or son's child, how low soever, takes  $\frac{1}{2}$  ; otherwise,  $\frac{1}{4}$ .

\* 12° WIFE : if no child or son's child, how low soever, takes  $\frac{1}{4}$  : if otherwise,  $\frac{1}{8}$ . Several widows' share equally.

COROLLARY.—All brothers and sisters are excluded by son, son's son, how low soever, father or true grandfather. Half brothers and sisters, on father's side, are excluded by these and also by full brother. Half brothers and sisters on mother's side are excluded by any child or son's child, by father and true grandfather.

## II.—Residuaries.

A.—RESIDUARIES IN THEIR OWN RIGHT, being *males* into whose line of relationship to the deceased no *female* enters.

### (a)—Descendants.

1. Son.
2. Son's son.
3. Son's son's son.
4. Son of No. 3.
  - 4A. Son of No. 4.
  - 4B. And so on, how low soever.

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\* Are always entitled to some shares.

† Are liable to exclusion by others who are nearer.

R Denotes those who benefit by the Return.

*(b).—Ascendants.*

5. Father.
6. Father's father.
7. Father of No. 6.
8. Father of No. 7.
  - 8A. Father of No. 8.
  - 8B. And so on, how high soever.

*(c).—Collaterals.*

9. Full brother.
10. Half brother by father.
11. Son of No. 9.
12. Son of No. 10.
  - 11A. Son of No. 11.
  - 12A. Son of No. 12.
  - 11B. Son of No. 11A.
  - 12B. Son of No. 12A.
  - And so on, how low soever.
13. Full paternal uncle.
14. Half paternal uncle.
15. Son of No. 13.
16. Son of No. 14.
  - 15A. Son of No. 15.
  - 16A. Son of No. 16.
  - And so on, how low soever.
17. Father's full paternal uncle by father's side.
18. Father's half paternal uncle by father's side.
19. Son of No. 17.
20. Son of No. 18.
  - 19A. Son of No. 19.
  - 20A. Son of No. 20.
  - And so on, how low soever.
21. Grandfather's full paternal uncle by father's side.
22. Grandfather's half paternal uncle by father's side.
23. Son of No. 21.
24. Son of No. 22.
  - 23A. Son of No. 23.
  - 24A. Son of No. 24.
  - And so on, how low soever.

*N. B.—a.* A nearer Residuary in the above Table is preferred to and excludes a more remote.

β. Where several Residuaries are in the same degree, they take *per capita*, not *per stirpes*, i. e., they share equally.

r. The whole blood is preferred to and excludes the half blood at each stage.

B.—RESIDUARIES IN ANOTHER'S RIGHT, being certain females, who are made residuaries by males parallel to them ; but who, in the absence of such males, are only entitled to legal shares. These female Residuaries take each half as much as the parallel male who makes them Residuaries.

1. Daughter made Residuary by son.
2. Son's daughter made Residuary by son's son.
3. Full sister made Residuary by full brother.
4. Half sister by father made Residuary by *her* brother.

C.—RESIDUARIES WITH ANOTHER, being certain females who become residuaries with other females.

1. Full sisters with daughters or daughters' sons.
2. Half sisters by father.

N. B.—When there are several Residuaries of different kinds or classes, *e. g.*, residuaries in their own right and residuaries with another, propinquity to deceased gives a preference : so that the residuary with another, when nearer to the deceased than the residuary in himself, is the first.

If there be Residuaries and no Sharers, the Residuaries take all the property.

If there be Sharers, and no Residuaries, the Sharers take all the property by the doctrine of the "Return." Seven persons are entitled to the Return. 1st, mother ; 2nd, grandmother ; 3rd, daughter ; 4th, son's daughter ; 5th, full-sister ; 6th, half-sister by father ; 7th, half-brother or sister by mother.

A posthumous child inherits. There is no presumption as to commorients, who are supposed to die at the same time unless there be proof otherwise.

If there be neither Sharers nor Residuaries, the property will go to the following class (Distant Kindred).

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### III.—*Distant Kindred.*

Comprising all relatives, who are neither Sharers nor Residuaries.

#### CLASS. 1.

Descendants ; Children of daughters and son's daughters.

1. Daughter's son.
2. Daughter's daughter.
3. Son of No. 1.
4. Daughter of No. 1.
5. Son of No. 2.
6. Daughter of No. 2, and so on, how low soever, and whether male or female.
7. Son's daughter's son.
8. Son's daughter's daughter.
9. Son of No. 7.
10. Daughter of No. 7.
11. Son of No. 8.
12. Daughter of No. 8, and so on, how low soever, and whether male or female.

*N. B. (a)*—Distant kindred of the first class take according to proximity of degree ; but, when equal in this respect those who claim through an heir, *i. e.*, sharer or residuary, have a preference over those who claim through one not an heir.

(*β*)—When the sexes of their ancestors differ, distribution is made having regard to such difference of sex, *e. g.*, daughter of daughter's son gets a portion double that of son of daughter's daughter, and when the claimants are equal in degree, but different in sex, males take twice as much as females.

#### CLASS 2.

Ascendants ; False grandfathers and false grandmothers.

13. Maternal grandfather.
14. Father of No. 13, father of No. 14, and so on, how high soever (*i. e.*, all false grandfathers).
15. Maternal grandfather's mother.
16. Mother of No. 15, and so on, how high soever (*i. e.*, all false grandmothers).

*N. B.*—Rules (*α*) and (*β*), applicable to class 1, apply also to class 2. Further (*γ*) when the sides of relation differ, the claimant by the *paternal* side gets twice as much as the claimant by the *maternal* side.

## CLASS 3.

## Parents' Descendants.

17. Full brother's daughter and her descendants.
18. Full sister's son.
19. „ „ daughters and their descendants, how low soever.
20. Daughter of half brother by father, and her descendants.
21. Son of half sister by father.
22. Daughter of half sister by father, and their descendants, how low soever.
23. Son of half brother by mother.
24. Daughter of half brother by mother and their descendants, how low soever.
25. Son of half sister by mother.
26. Daughter of half sister by mother, and their descendants, how low soever.

*N. B.*—Rules (a) and (β) applicable to class 1 apply also to class 3. Further, (δ) when two claimants are equal in respect of proximity, one who claims through a residuary is preferred to one who cannot so claim.

## CLASS 4.

Descendants of the two grandfathers and the two grandmothers.

27. Full paternal aunt and her descendants.\*
28. Half paternal aunt and her descendants.\*
29. Father's half brother by mother and his descendants.\*
30. Father's half sister by mother and her descendants.\*
31. Maternal uncle and his descendants.\*
32. Maternal aunt and her descendants.\*

*N. B.* (ε)—The *sides* of relation being equal, uncles and aunts of the whole blood are preferred to those of the half, and those connected by same father only, whether males or females, are preferred to those connected by the same mother only, (ε) Where sides of relation differ, the claimant by paternal relation gets twice as much as the claimant by maternal relation. (θ) Where sides and strength of relation are equal, the male gets twice as much as the female.

**GENERAL RULE.**—Each of these classes excludes the next following class.

IV.—SUCCESSOR BY CONTRACT OR MUTUAL FRIENDSHIP. V.—SUCCESSOR OF ACKNOWLEDGED KINDRED. VI.—UNIVERSAL LEGATEE. VII.—PUBLIC TREASURY.

\* Male or female, and how low soever.

## PRIVY COUNCIL.

*The 24th, 25th and 28th November, 1876.*

PRESENT :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

*On Appeal from Calcutta High Court.*ABEDOONISSA KHATOON\* (Defendant) *Appellant*,*vs.*AMENROONISSA KHATOON (Plaintiff) *Respondent*.*Execution Proceedings—Jurisdiction—Sect. 208 of Act VIII. of 1859—  
Sect. 11 of Act XXIII. of 1861.*

The widow of a decree-holder, having been substituted on the record under sect. 103 of Act VIII. of 1859 for the purpose of prosecuting an appeal, applied for execution on behalf of herself and as guardian of her infant son, whose legitimacy as a son of the deceased decree-holder was disputed and eventually decided in such execution proceeding, and obtained a declaration that she was entitled to execute the whole of her decree against the judgment-debtor.

In a suit by the widow of the judgment-debtor to set aside this judgment, *held*, that the above issue of legitimacy had not been decided by a competent Court in a competent proceeding.

Neither sect. 208 of Act VIII. of 1859, nor sect. 11 of Act XXIII. of 1861 authorized the Court to try the above issue of legitimacy in an execution proceeding, the infant son not having been a party to the suit in which the judgment was passed.

SIR ROBERT P. COLLIER:—The facts necessary to the understanding of the question which arises in this appeal may be thus shortly stated :

*Wahed Ali* brought a suit against his father *Abdool Ali* to recover the possession of a considerable quantity of landed property, and it may be enough for the present purpose to describe the subject of contention between them thus: The father had executed certain hibbanamahs in favour of his son when that son was an infant. It was alleged on the part of the father that the son had subsequently executed certain ikrar-namahs, whereby he divested himself of the benefit which he derived under the previous hibbanamahs. The Court of first instance dismissed the suit of the son, with the exception of that part which related to some property which he derived from his mother, and about which no question arose. Upon that *Wahed* appealed to the High Court. Pend-

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\* *Vide 4, Law Reports, Indian Appeals*, p. 66.

ing the appeal, *Wahed* died : and thereupon the High Court, as it appears to their Lordships, under the powers given them by sect. 103 of Act VIII. of 1859, substituted his widow *Abedoonissa* for *Wahed* for the purpose of prosecuting the appeal. The appeal was prosecuted; the High Court found the *ikrarnamahs* to have been invalid, and reversed the decision of the Court below. The Court observe that since the death of *Wahed* "disputes have arisen, and litigation is now pending concerning his proper legal representative; and for the purpose of prosecuting this appeal we have admitted his widow *Mussumat Abedoonissa Khatoon* to be his legal representative." At the conclusion of the judgment they thus express themselves: "The decree of the Court below is reversed, with costs. Confining ourselves to the matters in issue in the present suit, our decree will proceed on the basis of the validity of the three deeds of gift, and the invalidity of the later documents. We shall declare that Moulvi *Wahed Ali* was, in his life-time, and that those who are now by law his heirs and representatives are, entitled to a decree for setting aside the documents relied upon by the Respondents, and for the recovery of the property sued for." It is to be observed that the decree drawn up in pursuance of this judgment does not conform to that portion of the judgment in which it is said that the representatives of *Wahed* are entitled to a decree for the recovery of the property sued for. The decree is in these terms:—"It is declared that the several *ikrarnamahs* and *miras pottahs*, dated respectively the 29th Falgoon, 1259, 16th Aughran, 1263, 6th Jeyt, 1264, and the 15th Aughran, 1263, were of no effect, and void against Moulvi *Wahed Ali* in his life-time, and are void against his lawful representatives. And it is further ordered and decreed that the Defendants, Respondents, who appeared in this appeal, do pay to the Plaintiffs, Appellants, the sum of Rs. 3,000." So, in fact, all that could be executed under this decree is the order for costs, the rest of the decree being declaratory only.

It has been argued, however, that the decree ought to be taken to be in conformity with the judgment. Their Lordships are, by no means, satisfied that this decree *improvidè emanavit*. If it were necessary, they would be disposed to take it as it stands, and to declare that the rights of the parties were determined by it. But in the view which they take of the case it is not necessary to decide this point; and it may be assumed for argument's sake that the decree is in conformity with the latter words of the judgment which have been read.



An appeal was preferred from this judgment to Her Majesty in Council, and in 1875, the judgment was reversed. In the meantime, however, pending the appeal, certain execution proceedings were taken. The widow *Abedoonissa* applied for execution on behalf of herself, and also, in a different character, as guardian of an infant son, *Wajed Ali*, whom she alleged to have been born to her husband after her husband's death. The legitimacy of this child was disputed by *Abdool Ali*. Certain other parties also applied for execution, Messrs. *Wise* and *Dunne*; but as nothing appears to turn on the proceedings taken by them, no further mention will be made of them.

The Judge of *Dacca*, before whom the case originally came, appears to have held that he had no jurisdiction in a mere execution proceeding to determine such a question as the legitimacy or the illegitimacy of *Wajed Ali*, the son whom the widow had put forward as being legitimately born to *Wahed*. Unfortunately, we have not the original judgment of the Judge of *Dacca* before us. But we come to the conclusion that the Judge so decided, from the first order of the High Court on remand and what proceeded from the Judge upon the remand. The High Court, in remanding the case, made these observations: "The Lower Court has assigned no good reason whatever for not entertaining and disposing of the application for execution made in this case. Under sections 102 and 103, and section 208 of Act VIII. of 1859, the case may, so far as anything has been shewn to us to the contrary, be perfectly well disposed of without a separate regular suit." And thereupon they remanded the case to be disposed of by the Judge of *Dacca*, and directed him to determine the question of the legitimacy of *Wajed Ali*. After a second remand, this question was heard and decided by the Judge of *Dacca* and decided against the widow, the Judge holding that *Wajed Ali* was supposititious. Subsequently, on appeal, the same matter came before the Court; and two Judges of the High Court reversed the judgment of the Judge of *Dacca*, and held that *Wajed Ali* was the legitimate son of *Wahed*. They refer to the proceedings in this manner: They state: "The question that is now before us is, whether the person who goes by the name of *Wajed Ali* is or is not a posthumous son of the said *Wahed Ali*; and whether, therefore, one *Abedoonissa* who is admittedly the guardian of *Wajed Ali*, if there is such a person in reality, is entitled to execute the said decree partly in her own right and partly as mother and guardian of the said *Wajed Ali*,"—and they decree,—

"that *Abedoonissa* be declared entitled to execute the whole of her decree against the judgment-debtor before us,"—that is, in her two capacities, partly for herself and partly in her new capacity of guardian of *Wajed Ali*. It appears to their Lordships, that she, in her character of guardian of *Wajed Ali*, became a new party in these proceedings, just to the same extent that *Wajed Ali* would have become himself if, after he had come of age, he had appeared by his attorney.

Upon this, *Abdool Ali* having died, his widow *Ameeroonissa* instituted the present suit for the purpose of setting aside the last judgment which has been referred to mainly upon two grounds; in the first place, that in an execution proceeding it was not competent to the Court to entertain such a question as the legitimacy of *Wajed*; and secondly, upon the merits. On the other hand, *Abedoonissa* contends that the suit is not maintainable, because the very question has been decided between the same parties in a previous suit by a Court of competent jurisdiction. In other words, she pleads *res judicata*, and she also joins issue upon the merits.

As far as the merits are concerned, both Courts have found that *Wajed* was not the son of *Wahed*; and the sole question before their Lordships is this, whether this question is *res judicata* or not. There is no doubt that in the execution proceeding, which has been referred to, the very same issue was tried between the same parties. The sole question is, whether the Court has jurisdiction in such a proceeding to try it.

Some attempt was made to establish that *Abdool* had originally consented to the exercise of this jurisdiction, but their Lordships cannot assume this. The inference appears to them the other way. They have not the record of the first proceeding before the Judge of *Dacca*; but the Judge of *Dacca* decided that he had not jurisdiction to determine the question in that suit. It appears to their Lordships that it ought not to be assumed that he would have come to that conclusion unless the objection had been raised; the assumption would be the other way. They cannot, therefore, assume consent even if consent would have given jurisdiction in such a case.

The question, whether the jurisdiction existed or not, depends entirely upon the construction of certain sections in two Acts which have been referred to; the first being Act VIII. of 1859, and the second Act XXIII. of 1861. The sections of the first Act relied upon by the Court in their first remand are sections 102, 103, and 208. The first

sections, 102 and 103, relate to the substitution, in the case of the death of a sole Plaintiff or surviving Plaintiff, of a legal representative of such Plaintiff. The 102nd section refers to cases where there is no dispute. Sect. 103 is the section which, as before observed, was acted upon in this case, when *Abedoonissa* was allowed to prosecute the suit, and is to this effect: "If any dispute arise as to who is the legal representative of a deceased Plaintiff, it shall be competent to the Court either to stay the suit until the fact has been determined in another suit, or to decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit." Under the terms of this section, it not being decided by the Court that *Abedoonissa* was the legal representative of her husband, she was admitted "for the purpose of prosecuting the suit"; those being the very words used by the Court in their judgment. This section manifestly cannot apply to the case of *Wajed*, because this section, which comes under the heading of "Proceeding before Judgment" has reference only to a state of things existing before the hearing of the suit or at the hearing of the suit; and before and at the hearing of the suit there was no suggestion whatever that *Wajed* had any interest whatever in it. Then we come to sect. 208, which undoubtedly is a section relating to proceedings for execution and after judgment and decree. It is to this effect:—"If a decree shall be transferred by assignment or by operation of law from the original decree-holder to any other person, application for the execution of the decree may be made by the person to whom it shall have been so transferred, or his pleader; and if the Court shall think proper to grant such application, the decree may be executed in the same manner as if the application were made by the original decree-holder." It appears to their Lordships, in the first place, that, assuming *Wajed* to have the interest asserted, the decree was not, in the terms of this section, transferred to him, either by assignment, which is not pretended, or by operation of law, from the original decree-holder. No incident had occurred, on which the law could operate, to transfer any estate from his mother to him. There had been no death; there had been no devolution; there had been no succession. His mother retained what right she had; that right was not transferred to him; if he had a right, it was derived from his father; it appears to their Lordships, therefore, that he is not a transferee of a decree within the terms of this section.

Their Lordships have further to observe that they agree with the Chief Justice in the view which he expressed : that this was not a section intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree. It was not intended to enable them to try an important question, such as the legitimacy or illegitimacy of an heir. They are further fortified in this view by the consideration that under sect. 364 of this Act no appeal would lie from any judgment or decision given in a proceeding under sect. 208 ; it appears difficult to suppose that such an important question as this should be triable without appeal. Therefore, in their Lordships' view, agreeing with that of the Chief Justice, sect. 208 does not apply. Even if it did apply, it would appear to their Lordships that inasmuch as proceedings under it are not subject to appeal probably a suit would lie for the purpose of reversing an order made in pursuance of it.

Act VIII. then being disposed of, we next come to the second Act, Act XXIII. of 1861. The sole section relied upon has been the 11th, which is in these terms : " All questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suits, and the order passed by the Court shall be open to appeal." Their Lordships quite accede to the view of the learned counsel for the Appellant, that this section was intended to enable questions to be tried in execution cases which could not have been so tried before, and to provide, as might have been expected, an appeal from decisions in such trials ; but the question narrows itself to this, whether the present case comes under these words : " Any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree." There must be two conditions to give the Court jurisdiction. The question must be between parties to the suit, and must relate to the execution of the decree.

Their Lordships are of opinion that it would be straining the words

of this section beyond any legitimate construction which could be put upon them to apply them to the present case. In their judgment *Wajed Ali* appearing by his mother (and as before observed it would have been the same thing if he had been of age and had appeared in the usual way by his attorney or mooktear), was in no proper sense of the word a party to this suit. No rights of *Wajed Ali* were determined or considered in the suit. He was not on the record when judgment was given, nor when the decree was made. He subsequently applied for execution of the decree; but it appears to their Lordships impossible to say that a person by merely applying for execution of the decree thereby constitutes himself a party to the suit. Their Lordships are therefore of opinion that this section does not apply.

Under these circumstances their Lordships have come to the conclusion that the issue that had been referred to in the case was not *res judicata* by a competent Court in a competent proceeding; and for this reason they will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

## HIGH COURT, N. W. P.

*The 21st August, 1876.*

PRESENT :

Mr. Justice Turner and Mr. Justice Spankie.

MANNA LAL\* (Defendant) *Appellant*,

*versus*

The BANK of BENGAL (Plaintiff) *Respondent*.

*Act IX. of 1872 (Contract Act) ss. 2 (d), 25—Consideration—Agreement without Consideration—Void Agreement.*

Where the acceptor of certain *hundis* gave a mortgage of his immoveable property to the holder of the *hundis* as security for the payment of the *hundis* in the event of their dishonour when they became due. *Held*, in a suit on the mortgage-deed, the *hundis* having been dishonoured, that there was no consideration, within the meaning of that term in Act IX. of 1872, for the agreement of mortgage, and the same was void under s. 25 of that Act.

One Rai Lukshmi Chand, of Benares, drew two *hundis*, each for Rs. 2,500, the one payable on the 15th June, 1874, the other on the

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\* *Vide* I. L. R., 1, All, p. 309.

19th June 1874, on the defendant's firm at Cawnpore. These hundis were endorsed to the Bank of Bengal and discounted by the agent of that Bank at Benares, and were then forwarded to the agent of the Bank at Cawnpore, and by him presented to the defendant and accepted. On the 18th May, 1874, the agent at Cawnpore was informed that the drawer of the hundis was bankrupt. He immediately applied to the defendant to give security for the amount of the hundis, and on the 21st May, 1874, the defendant executed a deed of mortgage for Rs. 5,000. This suit was brought to recover that sum.

JUDGMENT.—\* \* \* But we must admit the validity of the plea that the contract of mortgage is void under the provisions of s. 25 of the Contract Act. We do not quite understand the Judge's argument as to the benefit which the appellant derived from the banking transaction. It does not appear that he had received any portion of the hundis when discounted, but assuming that he had done so, and admitting that under the circumstances he was liable on the hundis, neither the antecedent benefit, nor the existing liability, nor the anticipated advantage to which the Judge alludes, would constitute a consideration as defined in the Contract Act. To constitute a consideration as defined in that Act there must be an act, abstinence, or promise on the part of the promisee or some other person at the desire of the promisor. On the facts found there was no such act, abstinence, or promise, and therefore there was no consideration for the mortgage, and the contract is void. On this ground we must allow the appeal, and reversing the decrees of the Courts below so far as they decree the claim, we must dismiss the suit with costs.

## CALCUTTA HIGH COURT.

PRESENT :

Mr. Justice Pontifex.

POORNO CHUNDER COONDOO.\*

*versus*

PROSONNO COOMAR SIKDAR and another.

*Limitation—Act IX. of 1871, Sched. II. cl. 157—Execution of Ex parte Decree.*

Mere notice of execution of decree is not sufficient "process for enforcing" it within the meaning of cl. 157, Sched. II., Act IX. of 1871. Such process means actual process by attachment in execution of the person or property of the debtor.

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\* *Vide* I. L. R., 2, Calc. Series, p. 123.

PONTIFEX, J.—I have very little doubt that process of execution means actual process by attachment in execution of the judgment-debtor's person or property. The case of *Obhoy Churn Dutt† vs. Mudoo Soodun Chowdry* is opposed to this: but I prefer the decision in *Shib Chunder Bhadoore‡ vs. Luckhee Debia Chowdrain*. In my opinion mere notice of execution is not sufficient process for enforcing the decree.

## A CHAPTER FROM THE (NEW CIVIL) PROCEDURE CODE (ACT X. OF 1877.)

### CHAPTER III.

#### OF PARTIES AND THEIR APPEARANCES, APPLICATIONS AND ACTS.

26. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who is not found entitled to relief, unless the Court in disposing of the costs of the suit otherwise directs.

#### Notes.

This is a new provision. It is founded to some extent on the New York Code, s. 117. The "Common Law Procedure Act, 1860," 23 and 24 Vict. c. 126, s. 19, provides that "the joinder of *too many plaintiffs* shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist; and judgment may be given in favor of the plaintiffs by whom the action is brought, or of one or more of them, or in case of any question of misjoinder being raised, then in favor of such one or more of them as shall be adjudged by the Court to be entitled to recover: provided always, that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favor judgment is not given, unless otherwise ordered by the Court or a Judge."

Para. 1 of the "Memorandum of Practice in the trials of Civil Suits." 4, Legal Companion, p. 225 says "It should appear in the plaint that the persons, if more than one, who sue together as plaintiffs, *all* jointly as a whole and not some of them only, have the right, which it is the object of the suit to vindicate." But this section says that all persons who may be *jointly, severally or in the alternative*, (interested in the subject-matter of the suit or) entitled to the relief

† 5, Wym., p. 172.

‡ 6, W. R. Mis., 51.

sought for may be joined as plaintiffs. A person may be interested in the property to which the suit relates, and yet his interest may be such as cannot be affected by the decree. As, if land be so settled that it will undoubtedly belong to A at the death of B, but there is a suit between B and C as to the possession of the land during the life of B only ; A is interested in the land which forms the subject-matter of the suit, but he is not interested in that which is demanded by the plaint, and his interest cannot be affected by the decree. A, therefore, need not be a party to such a suit.

27. Where a suit has been instituted in the name of the wrong person as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may, if satisfied that the suit has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as the Court thinks just.

Court may substitute or add plaintiff for or to plaintiff suing.

*Note.*

This is a new provision. The mistake must be a *bonâ fide* one.

28. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

Persons who may be joined as defendants.

*Notes.*

*Vide* New York Civil Procedure Code, s. 118. Where a plaintiff sought for a declaratory decree that a certain thakbust map and the boundary line therein set forth are wrong, and brought one suit against the proprietors of the three different estates lying on a particular side of the line ; and it was not shown that the case was the same as regards the estates of the three defendants. Peacock, C. J., in delivering judgment, said "It by no means follows that because it may be wrong as to one, it is also wrong as to the others. Although the plaintiff is interested in shewing that the whole line is wrong, the defendants are interested only so far as their respective lands are concerned, and each of the defendants may have a separate case and different witnesses to prove that the line is laid down correctly so far as his estate is concerned. The Principal Sudder Ameen says that the plaintiffs were wrong in joining these several defendants in one suit, and on that ground he substantially rejected the plaint. In a recent Full Bench\* decision the Court pointed out the inconvenience of joining in one case a number of defendants whose cases might be wholly distinct from each other. If the plaintiff

\* *Vide* 8, W. R., p. 15.



is correct in joining these three defendants in one suit, he might have found 20 different defendants if there had been as many separately interested in maintaining the correctness of the thakbust map in as many different parts of it of which the plaintiff had an interest to dispute the correctness. In that case, a suit was brought against several defendants, each of whom claimed under a separate sale made by the father of a joint Hindoo family under the Mitakshara. The Court, in delivering judgment, made the following remarks :—‘ It is very inconvenient that a suit of this nature should be brought against a number of defendants whose interests are altogether distinct from each other. Section 8 of Act VIII. of 1859 allows causes of action to be joined in the same suit by and against the same parties. But there is no Clause which authorizes different causes of action to be joined in one suit against different parties where each of those parties has a distinct and separate interest. In this case, the validity of the different deeds depends each upon its own merits. It would be just as reasonable to sue four different defendants on bonds given by each of them or even to join them with a few other defendants for trespassing on the plaintiff's lands, as it was to join all the defendants in the present suit. Such a joinder in one suit of distinct causes of action against different defendants, each of whom is unconnected with the cause of action against the other, complicates the case before the Judge, and renders it exceedingly difficult for him in dealing with the case of each defendant to exclude from his consideration those portions of the evidence which may not be admissible against him though admissible against one or more of the others. Moreover, it is vexatious and harassing to the different defendants. Such a procedure renders it almost compulsory on all the defendants to be present, either in person, or by their pleaders, whilst the case is going on against the others in respect of matters in which they are not interested ; moreover, it is harassing and inconvenient as regards the attendance of the witnesses of the several defendants, as it renders it necessary for the witnesses of each to be present and to be detained whilst the case of the others is being heard and determined. Again, in appeal, each case must be argued as a separate and distinct case. I think, therefore, that the Judges below ought to be more careful, and to reject plaints when brought against several defendants for causes of action which have occurred against each of them separately, and in respect of which they are not jointly concerned.’ ” It is not an inflexible rule that all the defendants must have a joint interest in all the matters of the suit. S. 31 of this Act provides that no suit shall be defeated by reason of the misjoinder of parties. In the event of serious multifariousness being discovered, the Court should require the plaintiff to elect which cause of action he will proceed to trial upon, and should direct the remainder of the plaint to be withdrawn. 4, Legal Companion, p. 227.

29. The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes.

Joinder of parties liable on same contract.

missory notes.

### Notes.

*Vide* New York Civil Procedure Code, s. 120. In the case of *RICE* vs. *SHUTE*, Lord Mansfield in delivering judgment said "To be sure, a distinction is to be found in the books, between *torts* and *assumpsits*—'that in torts, all the trespassers need not be made parties; but in actions upon contract every partner must be made a defendant.' Many non-suits, much vexation, and great hindrance to justice, have been occasioned by this distinction. It must have been introduced originally from the semblance of convenience, that there might be one judgment against all who were liable to the plaintiff's demand. But experience shows that convenience, as well as justice, lies the other way. All contracts with partners are joint and several: every partner is liable to pay the whole. In what proportion the others should contribute, is a matter merely among themselves. A creditor knows with whom he dealt: but he does not know the secret partner. He may be non-suited twenty-times before he learns them all; or driven to a suit in equity, for a discovery, 'who they are.' It is cruel to turn a creditor round, and make him pay the whole costs of a non-suit, in favor of a defendant who is certainly liable to pay his whole demand; and who is not injured by another partner's not being made defendant; because, what he pays, he must have credit for in his account with the partnership. Upon this point I very early consulted the three other Judges of this Court, Mr. Justice *Denison*, Mr. Justice *Foster*, and Mr. Justice *Wilmot*. They were all of opinion, 'that the defendant ought to plead it in abatement:' he then must say 'who the partners are.' If the defendant does not take advantage of it at the beginning of the suit, and plead it in abatement, it is a waiver of the objection. He ought not to be permitted to lie by, and put the plaintiff to the delay and expense of a trial, and then set up a plea not founded in the merits of the cause, but on the form of proceeding. The old cases make no distinction between the plaintiffs knowing of a partnership or not. Here, indeed, the plaintiff knew of it: but the present defendant was the person with whom he transacted. He must be allowed this, in his account with the other partners. No injustice is done to the defendant, by allowing the plaintiff to recover; but great injustice is done to the plaintiff, by allowing the non-suit to stand; and what is still worse, a mode of litigation allowed which is highly inconvenient."

30. Where there are numerous parties having the same interest in one suit, one or more of such parties may, with the permission of the Court, sue or be sued, or may defend in such suit, on behalf of all parties so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such parties either by personal service or (if from the number of parties or any other cause such service is not reasonably practicable), then by public advertisement, as the Court in each case may direct.

One party may sue or defend on behalf of all in same interest.

*Notes.*

*Vide* New York Civil Procedure Code, s. 119.

When the question is one of common or general interest of so many persons that it is impracticable to bring them all before the Court, one or more may sue or defend on behalf of the whole, the reason thereof being stated in the plaint. But if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be joined as a defendant, the reason thereof being stated in the plaint. The plaint should distinguish the defendants, against whom relief is sought, from the others.\*

31. No suit shall be defeated by reason of the misjoinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Suit not to fail by reason of misjoinder.

Nothing in this section shall be deemed to enable plaintiffs to join in respect of distinct causes of action.

*Note.*

Hence it will appear that the plea of misjoinder is not a fatal plea.

32. The Court may, on or before the first hearing, upon the application of either party, and on such terms as the Court thinks just, order that the name of any party, whether as plaintiff or as defendant, improperly joined, be struck out ;

Court may dismiss or add parties.

and the Court may at any time, either upon or without such application, and on such terms as the Court thinks just, order that any plaintiff be made a defendant or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.\*

No one to be added as plaintiff or as next friend without his consent.

No person shall be added as a plaintiff, or as the next friend of a plaintiff, without his own consent thereto.

Parties to suits instituted or defended under section 30.

Any person on whose behalf a suit is instituted or defended under section 30 may apply to the Court to be made a party to such suit.

\* *Vide* 4, Legal Companion, p. 225.

All parties whose names are so added as defendants shall be served with a summons in manner hereinafter mentioned, and (subject to the provisions of the Indian Limitation Act, section 22) the proceedings as against them shall be deemed to have begun only on the service of such summons.

The Court may give the conduct of the suit to such plaintiff as it deems proper.

*Note.*

This is a new and a very important provision. This section should be very carefully studied.

33. Where a defendant is added, the plaint, if previously filed, shall, unless the Court direct otherwise, be amended in such manner as may be necessary, and an amended copy of the summons shall be served on the new defendant and the original defendants.

*Note.*

No remark seems to be necessary.

34. All objections for want of parties, or for joinder of parties who have no interest in the suit, or for misjoinder as co-plaintiffs or co-defendants, shall be taken at the earliest possible opportunity, and in all cases before the first hearing; and any such objection not so taken shall be deemed to have been waived by the defendant.

*Note.*

No remark is necessary.

35. When there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding under this Code: and in like manner when there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any such proceeding.

The authority shall be in writing, signed by the party giving it, and shall be filed in Court.

*Note.*

Corresponds with s. 115 of Act VIII. of 1859.

Where one of several representatives of a deceased judgment-creditor applies for the execution of a decree, the general powers of attorney contemplated by s. 17,

clause 1, (of Act VIII. of 1859) are not necessary; but it is sufficient, if the applicant is authorized under s. 115 of Act VIII. of 1859 to act for the other representatives. 2, Bom. H. C. Rep., (A. C.) p. 103.

### *Recognized Agents and Pleadors.*

36. Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party to a suit or appeal in such Court, may, except when otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf

Provided that any such appearance shall be made by the party in person if the Court so direct.

### *Note.*

Corresponds with s. 16 of Act VIII. of 1859.

An advocate of the High Court is entitled to appear and plead on the Appellate side, but not to *file* an appeal. A petition of special appeal had been signed and certified, and filed by an Advocate of the Court. *Held* that a Barrister who is an Advocate of the Court, who can plead only, is not authorized to file an appeal 13, *Suth. W. R.*, p. 60.

Recognized agents.

made or done are—

(a) persons holding general powers-of-attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

(b) mukhtárs duly certificated under any law for the time being in force, and holding special powers-of-attorney authorizing them to do, on behalf of their principals, such acts as may legally be done by mukhtárs;

(c) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

Nothing in the former part of this section applies to the territories now administered respectively by the Lieutenant Governor of the Panjáb, and the Chief Commissioners of Oudh and the Central Provinces; but in those territories the recognized agents of parties by whom such appearances, applications and acts may be made and done shall be such persons as the Local Government may from time to time, by notification in the official Gazette, declare in this behalf.

### Notes.

Corresponds with s. 17 of Act VIII. of 1859.

The Select Committee in their report say—"We have provided that certificated mukhtars holding special powers of attorney may be recognized agents, and declared that in the Panjab, Oudh and the Central Provinces recognized agents shall be such persons as the Local Government may by notification declare. This will enable the Local Government to keep, if it think fit, the special rules on this subject now in force in those territories."

This section does not empower mukhtars to *present* applications in Civil Courts. Certificated mukhtars holding special powers of attorney may only do such acts as may be legally done by mukhtars. They can neither present applications nor plead in the Civil Court. A mukhtar having once *presented* an application for the execution of a decree under s. 207, Act VIII. of 1859 on behalf of his client decree-holder in the Moonsiff's Court at Boalia, his application was returned on the ground that it ought to have been presented through a pleader. The matter having been subsequently brought before the Calcutta High Court, Markby and Lawford, J.J., confirmed the decision of the Moonsiff, holding that, "as a general principle, a party who makes\* an application must be ready and qualified to support it if the Court calls upon him to do so." But by law the mukhtar is not so qualified. *Vide* 4, Legal Companion, p. 47.

If a party is present within the jurisdiction of the Court when the suit is commenced, another person, though carrying on trade and business for and in the name of such party, cannot be his recognised agent within the meaning of s. 17, cl. 2 (Act VIII. of 1859), and has not authority to present a plaint on his behalf, or to appoint a pleader for him. (6, Bom., 159).

Under cl. 2, of section 17 of Act VIII. of 1859, it has been decided that a partner is not a recognized agent within the meaning of this clause, which has reference to such an agent as a gomastah or person acting for others, not (as in the case of a partner) carrying on business in the name of the firm, and for the benefit of himself and partners. Thus, service of a summons intended for one partner of a firm who was out of the jurisdiction, was made upon another partner who was within it. This was *held* not to be a sufficient service. 1, Hyde, 97.

38. Processes served on the recognized agent of a party to a suit ~~may~~ appeal shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs.

Service of process on recognized agent.

The provisions of this Code for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

### Note.

Corresponds with s. 17 of Act VIII. of 1859.

\* *Presents.*

39. The appointment of a pleader to make or do any appearance,

**Appointment of pleader.** application or act as aforesaid shall be in writing, and such appointment shall be filed in Court

When so filed, it shall be considered to be in force until revoked with the leave of the Court, by a writing signed by the client and filed in Court, or until the client or the pleader dies, or all proceedings in the suit are ended so far as regards the client

No advocate of any High Court established by Royal Charter shall be required to present any document empowering to act

#### *Note*

Corresponds with s 18 of Act VIII of 1859

This section makes an additional provision respecting revocation of the appointment of pleaders. Henceforth the leave of the Court will be required and it seems to be intended that no Court should grant such leave until the pleader whose power is to be revoked has been fully paid for the services already done by him.

The reader will find ample information regarding this section in the page headed "THE LEGAL PRACTITIONER" in Vol II of the Legal Companion &c in the January No of 1874

40. Processes served on the pleader of any party or left at the

**Service of process on pleader**

office or ordinary residence of such pleader, relative to a suit or appeal and whether the same be for the personal appearance of the party or not

shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes in relation to the suit or appeal as if the same had been given to or served on the party in person

#### *Note*

Corresponds with s 18 of Act VIII of 1859

This section has an additional provision for service on pleaders of process relative to appeals

41. Besides the recognized agents described in section 37, any person

**Agent to receive process**

residing within the jurisdiction of the Court may be appointed an agent to accept service of process

Such appointment may be special or general and shall be made by

**His appointment to be in writing and to be filed in Court**

an instrument in writing signed by the principal, and such instrument, or, if the appointment be general, a duly attested copy thereof, shall be

filed in Court

#### *Note.*

Corresponds with ss 50 and 51 of Act VIII of 1859

Henceforth attested copy of general appointment of agents to receive processes must be filed in Court



## PRIVY COUNCIL.

*The 30th June, 1st and 4th July and 25th November, 1876:*

PRESENT:

Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

*On Appeal from Calcutta High Court.*

RAM COOMAR COONDOO\* and another (Plaintiffs) *Appellants*,

*versus*

CHUNDER CANTO MOOKERJEE (Defendant) *Respondent*.

*ChamPERTY and Maintenance—Agreement to share the Subject of Litigation, when against Public Policy—Non-liability of Stranger to the Record for Costs of Suit, in the absence of Malice and Want of Probable Cause.*

The Respondent, as attorney and mooktear of *M.* and his wife, managed actions of ejectment and mense profits against the Appellants, advanced moneys for that purpose, and for the subsistence of his clients, having stipulated that he should be repaid all advances with interest at 12 per cent., and should have a third part of "the clear net profits" of the suit, with a right to possession of the land recovered as security therefor. He was neither an original nor an added party to the said suits, which, on appeal, were decreed in favour of *M.* and his wife by the High Court, but were afterwards dismissed by the Privy Council with costs, which *M.* and his wife were utterly unable to pay. Pending that appeal, the Respondent purchased the property in suit, and thereafter conducted the appeal in his own interest.

In an action by the Appellants against the Respondent to recover the amount of the said costs, it was averred, but not proved, that the actions were brought or instigated by the Respondent maliciously and without probable cause; and, failing such proof, it was contended, (1), that the agreement and acts of the Respondent amounted to champerty, or were otherwise illegal as being against public policy, and that the Appellants had suffered special damages from them; (2), that the Respondent was the real actor therein, and had an interest in them, and was, therefore, responsible for the costs:—

*Held*, that the English laws of maintenance and champerty are not of force as specific laws in India.

A fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy. But agreements of such a kind ought to be carefully watched, and when extortionate, unconscionable, or made for improper objects, ought to be held invalid.

Whatever the rights of the parties to this agreement, it does not constitute a punishable offence, and cannot give to the Appellants, who were strangers to it, a right of action against the Respondent.

Such agreement created no legal privity between the Appellants and the Respondent from which a promise can be implied on the part of the Appellants to pay the Respondent his costs of the former action, on which an action of contract can be founded; nor does it

\* *Vide* 4, Law Reports, Indian Appeals, p. 23.



establish a legal wrong, for the former action was brought without improper motives, and upon reasonable cause.

An action cannot be maintained against a third person on the ground that he was a mover of and had an interest in a suit, in the absence of malice and want of propable cause.

SIR MONTAGUE E. SMITH :—This suit was instituted by the Appellants, who were the successful Defendants in two former suits brought by one *McQueen* and his wife against them, to recover from the Defendant, *Chunder Canto Mookerjee*, who was neither an original nor added party in those suits, the amount of the costs incurred by them in that litigation, and which *McQueen* and his wife, by reason of their property, were unable to pay.

The principal suit of the *McQueens* (the other being for mesne profits only) was brought in the *Hooghly* Court to recover from the present Plaintiffs some lands in *Hooghly*, which their father had purchased of one *Bebee Bunnoo*.

Mrs. *McQueen* was the illegitimate daughter of one *McDonald* and *Bebee Bunnoo*, and she claimed the property as her father's, and as being entitled to it, after her mother's death, under his will. The defence of the now Plaintiffs in that suit was that *Bebee Bunnoo* was either the real owner, or had been allowed by *McDonald* to deal with the property as owner, and that their father was a purchaser from her without notice of any other title. It appears that they and their father had held possession of the property for twenty-four years after the purchase, and had greatly improved it.

The Principal Sudder Ameen held the suit to be barred by limitation, and dismissed it. The High Court (finding that *Bebee Bunnoo* had died within twelve years of the suit) reversed his judgment, and having retained the case, and tried it on the merits, passed a decree in favour of the then Plaintiffs, the *McQueens*.

On an appeal to Her Majesty, the decree of the High Court was reversed, and it was ordered that the suits should be dismissed, and that the then Defendants (the now Plaintiffs) should have their costs in *India*, and of their appeal to Her Majesty.

These costs amounted to a large sum, and the *McQueens* were unable to pay them.

The connection of the Defendant *Mookerjee* with the above litigation, and the facts relied on to support the present action, will now be referred to.

A special agreement was entered into between the *McQueens* and *Mookerjee*, which recited an apparently good title of the former to the property. By this agreement *Mookerjee* was appointed the attorney and mooktear of the *McQueens* to conduct the litigation against the present Plaintiffs. On the one side he undertook to manage the suit, to make all necessary advances for the purpose, and further to make an allowance of Rs. 150 per mensem to the *McQueens* for their support during the pendency of the proceedings. On the other side they agreed in effect that *Mookerjee* should have the management of the suit, they however assisting him, unless it happened that *McQueen* could give his whole attention to the litigation, in which case he was to have the conduct of it, "but under the control of *Mookerjee*."

It was stipulated that all the advances should be repaid with interest at 12 per cent., and that, as remuneration for his trouble and risk, *Mookerjee* should have a third part of "the clear net profits" of the suit; and, by way of security, it was agreed that he should receive all moneys, and take possession of all lands recovered, and after satisfying his own claims pay over the balance to the *McQueens*.

This power of attorney was made irrevocable, unless upon the terms that the *McQueens* should repay all the moneys advanced with interest at 12 per cent., and a further sum of Rs. 2,000 as liquidated damages.

*McQueen* certainly did not give his whole attention to the suits; and (although he occasionally saw the pleaders) they were really managed by *Mookerjee*.

It appears that after the present Plaintiffs had obtained leave to appeal from the judgment of the High Court in the original suit, the *McQueens* obtained possession of the property. The Court having ordered the possession to be restored, unless the *McQueens* gave security to the amount of Rs. 12,000 to repay what would be due in case the decree should be reversed, the present Defendant gave a bond to the above amount as such security.

Pending the appeal to Her Majesty, *Mookerjee* purchased of the *McQueens* all their interest in the principal suit, and the suit for mesne profits, for Rs. 22,000, out of which he was to deduct Rs. 12,000 for the advances he had made to them, and from this time he appears to have conducted the appeal in his own interest.

It should be stated that in the former suit the now Plaintiffs—upon the agreement between *Mookerjee* and the *McQueens* coming to their

knowledge—applied to the Judge to have *Mookerjee* made a party to the suit under the 73rd clause of Act VIII. of 1859, in order that, if successful, they might make him responsible for costs. The Judge refused the application. Upon the appeal to the High Court by the *McQueens*, the present Plaintiffs raised this point in their memorandum of cross-appeal, but no notice appears to have been taken of it in the judgment of that Court.

The plaint in the present action alleges that the Plaintiffs being in lawful possession as owners of the property in question, the Defendant, knowing this was so, maliciously conspired with the *McQueens* to bring a suit in their names to take the possession from him, and in furtherance of this conspiracy entered into the agreement already described, which is set out at length. It then alleges that the agreement contains false and fraudulent recitals of a pretended title in the *McQueens*, and that it “savours of champerty and maintenance, and is otherwise wholly illegal and contrary to public policy,” and was entered into “for the purpose of barratrously maintaining an unjust and oppressive suit against the Plaintiffs,” in the names of persons who had no right, and were without means to pay the costs. It then avers that the former suit was brought “maliciously and without reasonable and probable cause,” and after describing the proceedings in the suit, and the facts shewing the Defendant’s connection with them, alleges that “the litigation was instigated and carried on by the Defendant at his own expense, and with a view to his own benefit, and that he was the real mover, and unlawfully used the procedure of the Court for his own benefit.”

If all these allegations in the plaint, or so many of them as aver that the suit was brought or instigated by the Defendant, maliciously and without probable cause, had been proved, this action would undoubtedly have been sustained, upon the principle that the prosecution of legal proceedings which are instigated by malice, and are at the same time groundless, is a wrong to the person who suffers damage in consequence of them.

This principle is thus stated by Mr. Justice *Williams* in *Cotterill v. Jones* (1) :—

“It is clear no action will lie for improperly putting the law in motion in the name of a third person, unless it is alleged and proved that it is done maliciously and without reasonable or probable cause ;

but if there be malice and want of reasonable or probable cause, no doubt the action will lie, provided there be also legal damage."

In the present case, however, both the Courts below have found that neither malice nor the absence of probable cause have been proved. Their Lordships entirely agree with the Court in *India* on this point, and it appears to them that the facts present a case having a wholly different aspect.

With regard to the motives of the Defendant it is not pretended that he entertained any ill-feeling or malice in any sense towards the Plaintiffs. The terms of the agreement, and his large expenditure, shew that he was prompted in what he did by his having formed a favourable and sanguine opinion of the title of the *McQueens*, and by the hope of a profitable return for his advances. Nor can the suit be said to have been wanting in probable cause, when the two learned Judges of the High Court who heard it on appeal decided in favour of the then Plaintiffs. Indeed, it was properly admitted at their Lordships' Bar that the case must be considered as if the allegations of malice and want of probable cause were struck out of the plaint.

These allegations being eliminated, the question is whether the action can be maintained upon either of the two grounds argued at the Bar, which, stating them generally, are :—

1. That the agreement and acts of the Defendant amounted to champerty, or were otherwise illegal as being against public policy, and that the Plaintiffs have suffered special damage from them.

2. That the Defendant was the real actor in the former suits and had an interest in them, and was, therefore, responsible for the costs of them.

The question whether the law of maintenance and champerty, or any rules analogous to that law, as it exists in *England*, have been introduced into and form part of the law of *India*, has been for a long period in controversy in the Indian Courts. A beadroll of decisions from 1825 to the present time was cited at the Bar, and it certainly appears from them that the views of the Courts have not been uniform, and that great diversity of opinion has prevailed.

The earliest case referred to occurred in the year 1825. A pauper Plaintiff, in his petition of appeal to the Sudder Court, disclosed the fact that he had agreed to give half the estate in litigation to a third person in consideration of advances made to prosecute the appeal. The

Court, after directing a search in the records for precedents of such a transaction, and none having been found, declared that "the transaction savoured strongly of gambling," and also that the contract to give half of a large estate for a comparatively small advance was "by no means fair," and ordered that unless the agreement was cancelled the appeal should not be entertained. (*Ram Gkolam Sing v. Keerut Sing* (1) ).

In 1836 the Sudder Court refused to enforce against a successful litigant an agreement he had made to give two annas of the estate if recovered in consideration of advances made to carry on the suit. They held first, that the estate being family property could not be thus disposed of; but they also held on the authority of the decision in 1825 that the transaction was of an illegal character as a species of gambling, and could not be sanctioned in a Court of Justice. (*Brijnerain Sing v. Teknerrain Sing* (2) ).

In 1840 a similar agreement to that in the last case came before the Court: one Judge thought it was not proved; but the other, Mr. Tucker, held, following the two former decisions, that "the agreement was illegal, thus (as he said) establishing the point for future guidance in all similar cases." (*Zuhooroonissa Khanum v. Russick Lal Mitter* (3) ).

In a short note of a similar case in 1849, the Court is reported to have said: "As the precedents of the Court have held that champerty is illegal, we cannot enforce any condition (of the kind) in favour of the Plaintiffs." (*Andrews v. Maharajah Sreesh Chunder Rae* (4) ).

In the next case the current of opinion underwent a marked change.

In 1852 a case was brought before a full Sudder Court consisting of five Judges, in which the Principal Sudder Ameen had dismissed a suit because the Plaintiff had obtained the funds to prosecute it by means of an agreement which he deemed to be champertous. This decision of the Principal Sudder Ameen was, in any view of the law, erroneous; but the Judges took occasion to express their opinion on the general question. Sir R. Barlow says: "There is no distinct law in our Code which lays it down to be illegal for one party to receive and another to give funds for the purpose of carrying on a suit on promise of certain consideration in the form of a share of the property sued for, if decreed to the Plaintiffs." Mr. Welby Jackson, whilst he thought

(1) 4, Select Reports, 12.  
(2) 6, Select Reports, 131.

(3) 6, Select Reports, 298.  
(4) S. D. A., 1849, Beng., 340.

the precedents of the Court (referring to the cases already mentioned) had held champerty to be illegal, says: "But the matter having been now brought up generally for consideration before the whole Court, I have no hesitation in declaring my opinion that an arrangement of the nature of champerty is not of itself illegal or void." Again he says: "I know of no law against such an arrangement, and there is certainly no reason why it should be declared illegal. Such arrangements must stand or fall according to the peculiar nature of their conditions. They are liable to question like any others where a suit is brought to enforce or avoid them." The other three Judges construe the former precedents (with one exception) as holding only "that as between a Plaintiff and a party advancing funds to him to carry on his case, the Courts will not recognise and enforce agreements which appear to be exorbitant and to partake of the nature of gambling contracts." (*Kishen Lal Bhoomick v. Pearee Soondree* (1)).

This case appears to have been generally regarded as a leading decision. Mr. Justice *Glover* so treats it in a case which came before the High Court so late as 1868, and refers to it as deciding that champerty *per se* was not illegal: *Panchcouree Mahtoon v. Kalee Churn* (2). In this same case, however, Mr. Justice *Macpherson* said he did not feel it necessary to decide the question; and in consequence of the opinions expressed by him and other learned Judges in *India* in recent cases it will be necessary to advert shortly to some of the subsequent decisions.

In *Grose and Another v. Amirtamayi Dasi* (3), which was the case of a contract of a champertous character made by a Hindu widow, Mr. Justice *Phear*, after a full review of the English and Indian cases, expressed an opinion that the law which renders champerty and maintenance illegal in *England* is in force at least within the Presidency towns; and further that agreements of that character were against the interests of society in *India*, and therefore, on grounds of public policy, void. Upon an appeal to the full Court, the Chief Justice (Sir *Barnes Peacock*) did not adopt this ground of decision. He expressed his opinion thus:—"That the deed was not binding on the reversionary heirs, if not upon the ground of champerty, upon the ground that it was an unconscionable bargain, and a speculative, if not gambling contract."

(1) S. D. A., 1852, Beng., 394.

(2) 9, Suth. W. R., 490.

(3) 4, Beng. L. R., 1.

Mr. Justice *Macpherson* agreed with Mr. Justice *Phear* in thinking that the agreement was void, as being against public policy.

Mr. Justice *Holloway* in a case which came before the High Court of *Madras* in its original jurisdiction in 1870, expressed a strong opinion that the English statute and common law relating to champerty and maintenance prevailed in that Court, and rendered contracts bearing that character void. He also, with some vehemence of language, denounced such contracts as being contrary to public policy. The opinion expressed by Mr. Justice *Holloway* on the application of the English statute and common law was not necessary to the decision of the case, for the agreement sued upon was clearly extortionate, and there were other sufficient grounds for the refusal of the Court to enforce it. (*Mulla Jeffarji Tyeb Ali Saib v. Yacali Kadar Bi* (1) ).

This opinion of Mr. Justice *Holloway* seems to be directly opposed to the view expressed by Chief Justice *Scolland* in delivering the opinion of the High Court of *Madras* in a former case (*Pitchakutti Chetti v. Kamala Nayakkan* (2) ). The Chief Justice there says:—"Maintenance and champerty are made offences by the common and statute law of *England*, which in this respect has no application to the natives of this country, and in considering and deciding upon the civil contracts of natives on the ground of maintenance or champerty, we must look to the general principles as regards public policy and the administration of justice upon which the law at present rests. To this extent we think the law can properly be applied in perfect consistency with the Hindu law relating to contracts. (See 1, *Strange's Hindu Law*, p. 275.)"

The passage in *Strange* alluded to by the Chief Justice descants upon the similarity between English and Hindu law with regard to the invalidity of contracts which violate public policy and the interests of the community.

In a late case in the High Court of *Bombay*, *Damodhar Madharji v. Kahandas Narandas* (3), *Westropp*, C. J., declined to express any opinion as to the extent to which the law of champerty is applicable to the Presidency towns or in the Mofussil.

To return to the *Bengal* Presidency, it will be necessary to refer to one more decision only before coming to the judgments in the present suit. In the case of *Tara Soonduree Chowdhrain v. The Court of Wards* (4), the Court (Sir *R. Couch* being Chief Justice) held that the agreement

(1) 7, Mad. H. C. R., 128.

(2) 1, Mad. H. C. R., 153.

(3) 8, Bom. H. C. Rep. O. J., 1.

(4) 20, W. R., 446.

*fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil or of litigation disturbing the peace of families and carried on from a corrupt and improper motive."

The result of the authorities, then, appears to be that the English laws of maintenance and champerty are not of force as specific laws in *India*; and the decisions to this effect appear to their Lordships to rest on sound principles. So far as concerns the Mofussil, there is no ground on which it can be contended that these laws are in force there. The question has chiefly been whether they are in force in the Presidency towns, although the distinction between the Presidency towns and the Mofussil has not been always borne in mind.

It is to be observed that the English statutes on the subject were passed in early times, mainly to prohibit high judicial officers and officers of state from oppressing the King's subjects by maintaining suits or purchasing rights in litigation. No doubt, by the common law also, it was an offence for these and other persons to act in this manner. Before the acquisition of *India* by the British Crown, these laws, so far as they may be understood to treat as a specific offence the mere purchase of a share of a property in suit in consideration of advances for carrying it on, without more, had become in a great degree inapplicable to the altered state of society and of property. They were laws of a special character, directed against abuses prevalent, it may be, in *England* in early times, and had fallen into, at least, comparative desuetude. Unless, therefore, they were plainly appropriate to the condition of things in the Presidency towns of *India*, it ought not to be held that they had been introduced there as specific laws upon the general introduction of British law. The principles on which the exclusion from *India* of special English laws rest are explained in the well-known judgment of *The Mayor of Lyons v. The East India Company* (1). It appears to their Lordships that the condition of the Presidency towns, inhabited by various races of people, and the legislative provision directing all matters of contract and dealing between party and party to be determined in the case of Mahomedans and Hindus by their own laws and usages respectively, or where only one of the parties is a Mahomedan or Hindu by the laws and usages of the Defendant, furnish reasons for holding that these special laws are inapplicable to these towns. There seems to have been always, to say the least, great doubt whether they were in

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(1) 1, Moore's Ind. Ap. Ca., 176.



force there, a circumstance to be taken into consideration in determining whether they really were part of the law introduced into them.

It would be most undesirable that a difference should exist between the law of the towns and the Mofussil on this point. Having regard to the frequent dealings between dwellers in the towns and those in the Mofussil, and between native persons under different laws, it is evident that difficult questions would constantly arise as to which law should govern the case.

But whilst their Lordships hold that the specific English law of maintenance and champerty has not been introduced into *India*, it seems clear to them upon the authorities that contracts of this character ought under certain circumstances to be held to be invalid, as being against public policy. Some of the circumstances which would tend to render them so have been adverted to in the two judgments of this tribunal already cited.

Their Lordships think it may properly be inferred from the decisions above referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.

But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the *bond fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy,—effect ought not to be given to them.

Such, then, being the law on this subject in *India*, it fails to support the present action. It may be that the contract in this case is unconscionable, and one which ought not to have been enforced against the *McQueens* if their suit had been successful; but assuming this to be so, the Plaintiffs, in their Lordships' view, have failed to establish that an action arises to them therefrom against the Defendant for the losses and costs of the litigation. By the law of *India*, as above interpreted, the

it was sought to enforce was void, "as being contrary to public policy, and as therefore not giving any right to sue for the property which was professed to be passed by it." The learned Chief Justice commented upon and adopted the observations of this tribunal in the case of *Fischer v. Kamala Naicker* (1). He also referred with approval to the remarks of Mr. Justice *Holloway* as to the mischievous effects of such agreements in *India*.

It is to be observed that in none of the above cases did any question arise as to the liability of the parties who entered into the agreements to third persons.

To come to the judgments in the present suit. Mr. Justice *Macpherson* was of opinion upon the point now under consideration that the agreement was illegal and void as being against public policy, and he held, on the authority of the English case of *Pechell v. Watson* (2), that the present suit might be maintained.

In the judgment of the High Court delivered by Sir *R. Couch*, C. J., reversing Mr. Justice *Macpherson's* decree, the Chief Justice says: "It has been always admitted that the English Common Law and the statutes as to maintenance and champerty are not applicable, and are considered as having no force in this country. They certainly do not apply to the Mofussil, whatever question there might be how far they had been introduced within the jurisdiction of the Supreme Court. The ground upon which agreements which are champertous, or agreements for maintenance, have been held to be void in this country, is that they are contrary to public policy; or, as described by the Judicial Committee of the Privy Council (referring to the case in 8 *Moore*), are considered to be immoral and against public policy and such as the law will not enforce here, and treat as void." And he held that, though such agreements were in a sense illegal, they did not amount to "an offence in *India* so as to give a right of action to a person who might sustain special damage from it, even if such an action might now be maintained against a person committing the offence of champerty in *England*."

It will now be convenient to refer to two cases before this Committee in which the subject has been to some extent considered. In the case reported in the 8th *Moore*, the Court below having held an agreement to be void for champerty, this tribunal thought the judgment to be

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(1) 8, Moo. Ind. Ap. Ca., 170.

(2) 8, M. & W., 691.

wrong on the grounds that the point had not been raised by the pleadings, and also that the agreement was in no sense champertous, and this being so, their Lordships observed : " It was unnecessary to decide whether under the law which the Court was administering those acts which in the English law are denominated either maintenance or champerty, and are punishable as offences, partly by the common law and partly by statute, are forbidden." But in the course of the judgment they made the following observations : " The Court seem very properly to have considered that the champerty, or more properly the maintenance, into which they were inquiring was something which must have the qualities attributed to champerty or maintenance by English law ; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive is in the same sense necessary."

It is unnecessary now to say whether the above considerations are essential ingredients to constitute the statutable offence of champerty in *England* ; but they have been properly regarded in *India* as an authoritative guide to direct the judgment of the Court in determining the binding nature of such agreements there.

In the more recent case before this tribunal, *Chedambara Chetty v. Renga Krishna Muttu Vira Puchaiya Naickar* (1), in which a suit to enforce an unrighteous and champertous bond was dismissed, the following observations were made :—

" With respect to the law of champerty or maintenance, it must be admitted, and indeed it is admitted in many decided cases, that the law in *India* is not the same as it is in *England*. The statute of champerty being part of the statute law of *England*, has of course no effect in the *Mofussil* of *India* ; and the Courts of *India* do admit the validity of many transactions of that nature, which would not be recognised or treated as valid by the Courts of *England*. On the other hand the cases cited shew that the Indian Courts will not sanction every description of maintenance. Probably the true principle is that stated by Sir *Barnes Peacock* in the course of the argument, viz., that administering, as they are bound to administer, justice according to the broad principles of equity and good conscience, those Courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bond*

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(1) Law Rep., 1, Ind. Ap., 241.

support to the contention that an independent action will under such circumstances lie.

It was lastly insisted for the Plaintiffs that if the costs in *India* were not recoverable, the action ought to be sustained for those incurred in the appeal to Her Majesty, subsequently to the purchase made by the Defendant, pending that appeal, of all the rights of the *McQueens* in the property and the suit. Undoubtedly the *McQueens* after this purchase became nominal Appellants only, and the claim of the Plaintiffs to recover these latter costs is as strong as a case of the kind can be. But even so, it is not stronger than many cases of ordinary occurrence, as, for instance, trustees suing on behalf of those beneficially interested, or the assignors of choses in action on behalf of their assignees; and in these and similar cases which have long been familiar to the Courts, whilst modes, such as requiring security for costs, have been devised for reaching the real party, no independent action for the costs against a stranger to the record has ever been sanctioned. Their Lordships, therefore, think that no distinction can properly be made between the costs of the appeal and the rest of the costs.

It results from what has been stated, that by English law an action cannot be maintained against a third person on the ground that he was a mover of, and had an interest in the suit, in the absence of malice and want of probable cause. Consequently, if that law governs, the second ground on which it is sought to support the present action fails. And if the law administered in the Mofussil is to be resorted to, the absence of all precedent in a case of such common occurrence affords an irresistible presumption that no such action is maintainable there. In answer to the suggestion that if no precedent exists, it should now be made, it has been already pointed out that where there is neither privity of some kind nor a wrong, the principle upon which actions are ordinarily sustained is wanting. When it is urged that the claim should be decided upon general principles of justice, equity, and good conscience, it is to be observed, in addition to the considerations already adverted to, that these principles are to be invoked only in cases "for which no specific rules may exist." Now, it appears to their Lordships to result from what has been already observed, that rules may properly be considered to exist which define the character of actions of this kind, and the circumstances under which alone they can be brought, and that it would be out of place to resort to these general principles in dealing with

such actions. The consequences of such a resort in cases of this character would be to make the law utterly uncertain, to raise, as before observed, interminable questions as to the degree of interference which would sustain the action, and mischievously to multiply and perpetuate litigation after the termination of the original suit. Their Lordships, therefore, feel constrained to hold that in the absence of circumstances to convert the prosecution of the former suit into a wrong, the present action cannot be maintained.

It has been a misfortune to the Plaintiffs that security was not obtained for the costs in the course of the former suit. Their Lordships also think the Defendant was to blame in not coming forward as the real party in the former appeal. Under these circumstances, whilst they must humbly advise Her Majesty to affirm the judgment appealed from, they will make no order as to costs.

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### CALCUTTA HIGH COURT.

*The 4th September, 1876.*

#### FULL BENCH.

##### PRESENT :

*Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Jackson, Mr. Justice Macpherson, and Mr. Justice Markby.*

**RAJENDRONATH MOOKHOPADHYA\*** (one of the Defendants)

*versus*

**BASSIDER RUHMAN KHONDKHAR and another** (Plaintiffs).

*Landlord and Tenant—Notice to quit—Suit for Ejectment—  
Procedure.*

A ryot whose tenancy can only be determined by a reasonable notice to quit, expiring at the end of the year, can claim to have a suit for ejectment brought against him by his landlord dismissed on the ground that he has received no such notice.

This case was referred to a Full Bench in the following order of reference (in which the facts sufficiently appear) by

MARKBY, J.—The facts of this case may be very shortly stated. The plaintiff was a cultivating ryot, not having (as far as appears) any right of occupancy and not holding for any specified term. In Jeyt, 1279, (13th May to 13th June, 1872), his landlord, without giving him any notice at all, put in a fresh tenant. In Pous, 1279, (14th December, 1872, to

agreement did not constitute a punishable offence, and the action cannot therefore, as pointed out by the Chief Justice below, be sustained on the ground that where an indictable offence has been committed, and an individual has suffered special loss, a remedy by action is given to him as the party aggrieved, nor does there appear to be any other principle upon which the action, under the circumstances of the present case, can be maintained. Whatever, therefore, may be the rights of the parties to the agreement as between themselves, their Lordships think that the High Court was right in holding that the action of the Plaintiffs against a third party, founded on the alleged champerty, cannot be maintained.

There remains the question whether the action can be supported against the Defendant, as being an actor in the suit, and having an interest in it. It is to be observed that a suit of this kind, in the absence of malice, and of the want of probable cause, is of the first impression, no precedent for it having been found either in *England* or *India*. It may be assumed that, under the first agreement, the Defendant acquired a contingent interest in the property the subject of the suit to the extent of one-third share, besides the security for his advances; that he agreed to supply all the funds required to carry on the litigation, and that he obtained the virtual control of the proceedings; for although, under certain circumstances, *McQueen* was to manage the suit, and in any case to assist in the management, the supreme control was to belong to the Defendant, subject to a power of revocation by the *McQueens* on onerous terms, which was not exercised. But this state of things created no legal privity between the Plaintiffs and the Defendant, from which a promise can be implied on the part of the Defendant to pay the present Plaintiffs the costs of the former suit, on which an action of contract can be founded; nor does it establish a legal wrong, for the former suit, as already shewn, was brought without improper motives, and upon reasonable cause. It has, however, been contended that it would be only in accordance with justice and equity that he who was the principal mover of a suit, and had an interest in it, should be made liable to the costs. It is obvious that a wide field of new litigation would be opened if, after the termination of the original suit, another independent suit might, on such general grounds, be brought against third persons. Interminable questions would arise as to the degree of meddling and assistance which would create the liability. So far as precedents exist, it is either in the original suit itself, or by the exercise

of the summary jurisdiction of the Courts, that any such liability has been enforced. It is ordinary practice, if the Plaintiff is suing for another, to require security for costs, and to stay the proceedings until it is given. The now Plaintiffs were fully aware, during the pendency of the former suit, of the arrangement between the *McQueens* and the Defendant, but instead of applying for security for costs, they petitioned the Court to make him a co-Plaintiff under the 73rd section of Act VIII. Without deciding whether this application was rightly rejected, it is enough to say that its rejection cannot give ground for an action which would not otherwise lie.

The instances in which persons other than parties to the suit have been held liable to costs in *England*, have been principally those of solicitors, over whom the Court exercises disciplinary jurisdiction, as in the case of *In re Jones* (1). The Courts have also ordered the real parties to pay the costs in actions of ejectment, originally on the ground that that action was in form a fictitious proceeding, and having once assumed this power they have continued to exercise it in the actions substituted for that of ejectment. Again, the Courts, it has been said, would so interfere in case of any contempt or abuse of their proceedings: see *Hayward v. Gifford* (2). But all these cases relate to applications either in the cause itself, or to the summary jurisdiction of the Court.

A case in the High Court in *Calcutta* was much relied on by the Appellant's counsel: *Bamasoonduree Dossee v. Anundolal Bose* (3). There in a suit brought (in the original jurisdiction) to recover possession of land by a nominal Plaintiff, Mr. Justice *Phear*, on a motion, made apparently in the suit, ordered the real Plaintiffs to pay the costs. His judgment is placed mainly on the ground that the jurisdiction exercised by the English Courts in actions of ejectment was introduced into the original jurisdiction of the High Court, and was applicable to analogous actions brought to recover land there. The Chief Justice (Sir *Barnes Peacock*) in affirming this order on appeal, supported it not only on the ground on which Mr. Justice *Phear's* judgment rests, but on the circumstances of the case, which shewed, as he thought, that there had been "a gross abuse of the powers of the Court, and a contempt of Court."

It is obvious that there is nothing in these judgments which gives

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(1) Law Rep. 6 Ch. 497.

(2) 4, M. & W., 194.

(3) Bowke's Rep. O. C. J., 45; and on appeal, p. 96.

12th January 1873), the plaintiff brought this suit to recover possession. The zemindar, who together with the in-coming tenant, defended the suit, alleged that the plaintiff had relinquished his tenure in 1276 (1869—1870). Both Courts have found that there was no relinquishment, and have given the plaintiff a decree.

In special appeal it is contended that the plaintiff had no title upon which he could recover possession. Of course, as against any one but his own landlord, it is clear that the plaintiff had a title to recover possession; and even as against his own landlord, I should have thought that the plaintiff could have recovered possession. It is I think clear upon the authorities that he could not have been ejected without reasonable notice, and then only at the end of the year—*Bakranath Mandal v. Binodram Sen* (1) and *Janoo Mundur v. Brijo Singh* (2). And unless his tenancy has been put an end to by this present litigation, it is still subsisting.

This last point is the one upon which the doubt arises in consequence of a decision in *Hem Chunder Ghose v. Radha Pershad Paleet* (3). There the learned Judges, whilst recognizing the right of the tenant to a reasonable notice to quit, expiring at the end of the year, seems nevertheless to consider that the institution of a suit is itself a sufficient demand of possession for the purpose of maintaining the suit, and that the tenant's claim for a reasonable notice, expiring at the end of the year, will be satisfied by fixing such a date for giving up possession as will be fair towards himself.

If that be so, I do not think the plaintiff in the present case could recover possession; he would only be entitled to some compensation for having been ejected too soon.

But with very great deference, I cannot bring myself to think that the decision I have referred to is correct. I do not see how the landlord, who has not determined the tenancy by a proper notice, can recover in ejectment. Even in the case of a tenancy-at-will, it is necessary under English law that the will should be determined—*Doe & Jacobs v. Philips* (4), where it was argued that the will was determined by bringing the action, but the Court held that it was not so. The case of a ryot whose tenancy can only be determined at the end of the year by a reasonable notice to quit is a much stronger one.

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(1) 1, B. L. R., F. B., 25.

(2) 22, W. R., 548.

(3) 23, W. R., 440.

(4) 10, Q. B., 130.



It seems to me impossible to consider such a ryot otherwise than as a tenant from year to year. I do not say that the incidents of the tenancy are precisely the same as those of a yearly tenancy in England. But I cannot think that the ryot can be ejected without a proper notice to quit.

The case of *Hem Chunder Ghose v. Radha Pershad Paleet* (1) is based upon the decision in *Mahomed Rasid Khan Chowdry v. Jadoo Mirdha* (2); but I am strongly disposed to think that the learned Judges did not there intend to lay down any proposition of law at all; I think that decision only carries out a suggestion made by the Court for the benefit of the parties and in order to avoid further litigation.

The question being one of great importance, I feel myself justified in referring to the Full Bench the question whether a ryot, whose tenancy can only be determined by a reasonable notice to quit, expiring at the end of the year, can claim to have a suit brought against him by his landlord dismissed on the ground that he has had no such notice, or whether in such a case the Court ought to give a decree in favor of the landlord, fixing a date for giving up possession, which shall be fair towards the tenant.

The opinion of the Full Bench was delivered by

GARTH, C. J.—We are of opinion that, in the case of a ryot of the class specified in the question referred to us,—i. e., a ryot whose tenancy can only be determined by a reasonable notice to quit expiring at the end of the year,—the ryot can claim to have a suit for ejectment brought against him by his landlord dismissed on the ground that he has had no such notice.

## BOMBAY HIGH COURT.

*The 28th November, 1876.*

PRESENT :

Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

PRANSHANKAR SHIVSHANKAR\* (Defendant) *Appellant*,

*vs.*

GOVINDHLAL PARBHUDAS, (Plaintiff) *Respondent*.

*Action for damages caused by a civil action—Costs.*

No action is maintainable for damages occasioned by a civil action, even though brought maliciously and without reasonable and probable cause; nor will it lie to recover costs awarded by a Civil Court.

(1) 23, W. R., 440.

(2) 20, W. R., 401.

\* *Vide* I. L. R., 1, Bom. Series, p. 467.

The following case was submitted for the opinion of the High Court by Gopalrao Hari Deshmukh, Judge of the Court of Small Causes at Ahmedabad :—

“ The plaintiff Pranshankar obtained a decree against one Govind Khusab, in the Subordinate Judge’s Court, and got two houses attached on the 20th July 1872. Govind Purbhudas, defendant in the present suit, applied to the Court under Section 246 of the Code of Civil Procedure, on the 1st August 1872, for removal of the attachment laid on the houses, alleging that they were purchased by him. The objection was allowed by the Subordinate Judge, who ordered the attachment to be removed. Whereupon the plaintiff instituted a regular suit against the defendant which was decided in favour of the latter. Against this decision the plaintiff appealed to the Assistant Judge’s Court, which decided on the 26th August 1874 that the purchase-deed was fraudulent, and that the objection to the sale be disallowed. Consequently the plaintiff recovered the amount decreed, not by sale of the houses, but by cash payment of Rs. 600. The plaintiff now seeks in this Court to recover interest at 9 per cent. per annum, from 20th July 1872 to 25th October 1875, during which period he was prevented from executing his decree by the defendant, and the amount of costs that was paid by him to the defendant, as awarded by the Subordinate Judge in the miscellaneous application for removing the attachment. The question is whether a suit for such damages can be maintained.

PER CURIAM :—The Court is of opinion that the suit will not lie. An action is not maintainable for damages occasioned by a civil action, even though brought maliciously, and without reasonable and probable cause (*see* Addison on Wrongs, p. 599, 3rd edition); neither will a suit lie to recover costs awarded by a Civil Court, though it may lie for costs which could not be so awarded : *Chengulva Raya Mudali v. Than-gatchi Ammal* (1).

(1) 6, Mad. H. C. Rep., 192.

## THE LEGAL GUIDE.

WE have on our table a series of pamphlets, entitled "The Legal Guide," edited by Baboo Kumud Nath Dutt, Sheristadar of the Board of Revenue, Calcutta. The author intends to publish abstracts from the Regulations and Acts that are in force in Bengal and assures his readers "that no pains will be spared to make these abstracts as complete and simple as possible and that everything which they may consider important to them will be noticed" in his work, which is "published bi-monthly in dig-lot forms in the easiest style" both in the English and Bengali languages. The price of the work is Rs. 5-8 per year. Every issue contains 2 forms or 16 pages (royal octavo). We have carefully gone through all the numbers that have been published and are undoubtedly of opinion that this work will not only facilitate the study of Indian Statutes, but will, when completed, be a Compendium of very valuable legal information, capable of being used for reference or practical purposes with the greatest readiness and ease. It is written in the simplest style. We believe that this work will do immense good especially to the people of Bengal. The following extracts will show whether we are justified in making the above remarks or not.

### *Acquisition of Land for Public Purposes.\**

(ACT X. OF 1870.)

• Act X. of 1870, which repealed all other Acts on the subject, was passed by government in order to legalize and facilitate proceedings in connection with the acquisition of lands for its own purposes and those of any company or corporation. It extends to the whole of British India.

2. Whenever any land is required for a public purpose the Collector prepares an estimate of the value of the land and causes a public notice (which shall legalize the entering upon, and taking all necessary pro-

17. Acquisition, Secs. 4—

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\* Legal Guide, Part I. Chapter X. p. 125.

*ceedings for marking out boundaries of, the land, provided that for entering into any building or any enclosed garden attached to a dwelling-house a seven days' notice must be given to the occupier, on the land, and another, to the proprietors or occupiers of such land, requiring them, to appear, personally or by agent, before him at a time not earlier than 15 days from the date of its publication and to give him a statement of the nature of their respective interests in, and rents and profits arising from, it; and such persons are legally bound to do so, under sections 175 and 176 of the Indian Penal Code (4 and 5). In making the necessary enquiries for determining the amount of compensation, the Collector has power of the Civil Court in enforcing the attendance of witnesses and compelling the production of documents. If he and the persons interested, agree as to the amount of compensation, the Collector makes an award, which shall finally determine the matter; but if they do not, or if no claimants or persons interested attend on the fixed day, or if any dispute as to the right or interest in the land arise among the persons, the Collector refers the matter to the Civil Court in the following manner. (11—15.) In cases of urgency, the Collector may take possession of the land, even if there be no award, or reference made to the Court, and adjust the matter thereafter (16-17).*

3. On a reference being made to it, the Court shall proceed to serve notices on the persons interested and the Collector, requiring them to appoint two qualified assessors, respectively, to aid it in determining the amount of compensation; and in case of failure to nominate either of such assessors the Judge himself appoints one. (18—22). In determining the amount of compensation in an open court, the Judge or assessors shall stick themselves to the following points (a) the market price of the land in question—(b) the damage sustained by the person, injuriously affecting his other property in any other manner—or his earning;—(c) the reasonable expense for removing his residence. And they shall leave out of consideration the following—(a) degree of urgency which<sup>\*</sup> led to the acquisition—(b) any increase in the value of the land, thereafter, as of any other land of the person likely to accrue from the use of the land acquired; (c) any improvement made on the land, with the intention of increasing the amount of compensation. The amount of compensation shall not exceed the Collector's offer, if the person refuses to make any claim, without sufficient reason, but if he does so with sufficient reason,

Reference to Civil Court,  
Secs. 18—35.

it may exceed, the amount tendered by the Collector at the time of reference (23—26) and if the Judge and one of the assessors agree, their decision is final : but if the Judge and the assessors differ upon any point of law or usage, having the force of law, or as to the amount of compensation, the opinion of the Judge shall prevail but in the latter case, an appeal may lie to an authority immediately above him like regular appeals under the Code of Civil Procedure. An assessor not being a Government officer, is entitled to a fee not exceeding 500 rupees ; (28—31). The whole cost of the proceedings shall be taken from the persons interested, if the amount, so decided, does not exceed that in the Collector's tender ; but if it does, the Collector should pay the whole. (32—35).

4. Apportionment of compensation should be made by the Collector, with the consent of all persons interested in the land ; but if any dispute arise between them respecting it, he shall refer the matter for the decision of the Court, which again is appealable to an authority immediately above it, like regular appeals under the Code of Civil Procedure (37—39).

5. The Collector is to pay 15 per-cent. on the market price in addition to the amount of compensation awarded, and then take possession of the land, which however may remain with the proprietors, until it is required. If compensation and the said percentage be not paid, on taking possession, he is to pay them the amount with interest at the rate of 6 per-cent. per annum but he shall deduct, from the amount, the costs (if any) in the proceedings, and shall not pay the amount until the time for appeal is over or if it is preferred, until it is disposed of.

6. If the land is to be occupied for a limited time, the term for such occupation shall not exceed 3 years. The Collector, as directed by the Local Government, shall give notice to the persons interested in the land, and make an agreement with them, specifying the amount of compensation to be paid either at once, or by instalments, but if they differ as to the said amount, the case will be referred to the Court, (43). The agreement or the reference being made, the Collector may take possession of the land, and pay compensation for any damage caused in consequence. If the land be rendered permanently unfit to be used, the Local Government shall proceed to acquire it permanently in the

manner stated above (44). If the Collector and the persons interested differ as to the condition of the land after the term is over the case will be referred to the Judge, who, sitting alone, will finally decide the matter (45).

7. The proceedings in acquiring any land for a Company are as follow.—If the Local Government, after inquiry through an authorized officer who is also empowered to enforce the attendance of witnesses and compel the production of documents, is satisfied that the land is needed for the intended work and that such work will prove beneficial to the public, it shall, after requiring the company to enter into an agreement with the Secretary of State for India in Council, and providing for all necessary matters, authorize any officer of the Company who shall be deemed as an officer of the Government to take proceedings under the Act. Every such agreement, after its execution, shall be published in the Gazette of India as well as in the Local Official Gazette. All subsequent proceedings are conducted under the general rules laid down in this Act. (46—50).

8. Any notice under the Act, whether signed by the Collector or Judge or by the authorized officer shall be served on the person, by delivering a copy thereof either to the person himself or to any adult male member of his family, or by hanging it on the outer-door of his mansion (51). Whoever wilfully opposes any person in doing any thing necessary for making experiments, or does any inquiry into the trench or boundary is liable to imprisonment for any term not exceeding one month or to fine not exceeding 50 Rupees or to both (52). Part of a house or building is not to be taken when the owner desires that the whole shall be so acquired (55). No person is bound to pay stamp duty for an award or agreement made under this Act, or any fee for a copy of the same (57). No suit shall be brought to set aside an award under this Act; and no suit shall be instituted against any person for any thing done in pursuant to this Act, without giving him a month's previous notice; and the time of such an action is three months from the date of the cause of action (58).

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*Land Improvement.\**

(ACTS XXVI. OF 1871, XX. OF 1873, XVI. OF 1874 AND XXI. OF 1876.)

The Government may make advances for the improvement of lands used for agricultural purposes or waste lands which are culturable, on the applicant's furnishing good security.

2. When the applicant is a landlord and the value of the property pledged is not less than the amount applied for, the Collector may grant a certificate sanctioning the advance. When the applicant is a tenant with transferable interest the landlord is served with a notice showing the particulars of the application and if no objection is preferred within a month after the service of the notice and if the value of the property pledged be not less than the amount claimed, the Collector may grant a certificate for the amount. The landlord must stand security for the tenant who fails to furnish a security as above.

Persons entitled to advances, Sections 6—13.

Improvements, Section 1.

3. Advances are made only for the following purposes :

1st, Wells, tanks and other works for the storage, supply or distribution of water for agricultural purposes or the preparation of land for irrigation ;

2nd, Works for the drainage of land ; for the reclaiming of land from rivers or from other waters ; for the protection of land from floods or from erosion or other damage by water ;

3rd, The reclaiming, clearing or enclosing of lands for agricultural purposes ;

4th, The renewal or reconstruction of any of the foregoing works, or alterations therein, or additions thereto.

4. The certificate granted under this Act shall specify (a) the amount of the advance ; (b) the conditions under which it is to be made and recovered ; (c) the position, extent and boundaries of the land to be improved ; and (d) the nature and amount of the security furnished, if any, other than the land to be improved.

Certificates, Section 14.

Recovery of advances, Sections 15 and 16.

5. The advances, if not voluntarily repaid, are recoverable, with interest and costs if any, as arrears of revenue.

\* Legal Guide, Chap. XI., p. 131.

6. The revised rules regulating the form of application, mode of Rules, Section 18. enquiry &c. are important and are quoted below—

Advances under these rules may be made from such sums as the Governor-General in Council may from time to time allot to the local Government, or as may be otherwise at its disposal for the purpose of such advances.

2. Applications for advances under the Act shall be made in writing. They shall be presented to the Collector of the district, to the Assistant Collector in charge of the sub-division, or to the tehsildar in charge of the tehsil in which the land to be improved is situated. The personal attendance of the applicant is not necessary.

3. The application shall state—

- (1) the name, caste, parentage, profession, and residence of the applicant ;
- (2) the amount of the advance applied for ;
- (3) the nature and description of the work for which the advance is required ;
- (4) the security offered for the repayment of the advance.

In the case of an application for an advance exceeding Rs. 1,000, the application shall further state—

- (5) whether the applicant proposes to supplement the advance by any private capital, and if so, to what extent ;
- (6) the estimated total cost of the proposed work, and the probable period that will be occupied in its construction ;
- (7) the village and local revenue sub-division in which the land to be benefited is situated, the position, character, and area of such land, and should it consist, in part or wholly, of numbered and measured fields or plots, the numbers of the same ;
- (8) the applicant's rights or interests in the land to be benefited and in any other land offered as security for repayment of the advance, and whether there are any, and if so, what, incumbrances on such rights or interests ;
- (9) the advantages expected to result from the work ;
- (10) the manner and extent to which the proposed work will affect (favourably or injuriously) adjoining or other lands ;
- (11) the amount and number of the instalments by which the advance is to be repaid, principal and interest, and the dates on which these instalments are to be paid.



4. When the application is for an advance not exceeding Rs. 1,000, the officer to whom it is presented shall ascertain, so far as may be possible from the oral statements of the applicant, or otherwise, the particulars numbered (5) to (11) above. These particulars shall be recorded on, or on a paper to be attached to, the application, and shall be signed by the officer, read over to the applicant, and acknowledged by him to be correct.

5. If the application be for a sum exceeding Rs. 1,000, and it be found to have omitted any of the particulars required by rule 3, the officer receiving it may either return it for correction, or, at his discretion proceed as required by rule 4 in the case of applications for sums not exceeding Rs. 1,000.

6. The statements under head (8) of the heads mentioned in rule 3, whether contained in the application or recorded under rule 5, shall at once be tested, as far as may be possible, by reference to such records bearing upon them as may be accessible to the officer to whom the application is made.

7. If the officer receiving the application be not authorized by the local Government under section 3 of the Land Improvement Act, to exercise the powers of a Collector under the Act, he shall forward the application to the Collector of the district, who shall either dispose of it himself or refer it to an authorized officer for disposal.

8. If the Collector or other such authorized officer as aforesaid (hereinafter called the "Collector") considers that there is *prima facie* reason to believe that the application should be granted, he shall cause it to be entered in the register of applications and shall order a local inquiry to be made. If he is of opinion that the application should not be granted, he shall reject it.

• 9. There shall be a local inquiry in every case. It shall be conducted by such persons and according to such rules as the local Government may from time to time prescribe, and shall be directed to testing and verifying the statements required by rule 3 to be entered in the application, or by rule 4, to be recorded by the officer receiving the application.

If the officer receiving the application has been unable, in his examination of the applicant under rule 4, to obtain information under any of the headings (5) to (11) of rule 3, the omission shall be supplied by the person making the local inquiry.

10. When the work to be undertaken will cost more than Rs. 5,000 and is one requiring professional skill, the applicant shall be required to submit to the officer making the local enquiry an accurate plan, specification, and estimate. If the applicant is unable to furnish such a plan, estimate, or specification, the Collector may cause them to be prepared on behalf of the applicant, first requiring him to deposit such sum of money as may, in the opinion of the Collector, be sufficient to cover the cost, or, if he think fit, calling upon him to give security for the repayment of the same.

11. On the completion of the inquiry, the officer by whom it was made shall forward to the Collector the whole of the papers connected therewith, together with his own opinion and recommendation. If the Collector, on receipt of the papers, thinks further inquiry necessary, he may either make such inquiry himself or remand the case to the official who made the first inquiry, or transfer it to any other official authorized to conduct such inquiries, for the purpose of a further investigation being made.

12. If, on a review of the local inquiry, the Collector is satisfied that the advance may be properly made, or that a less sum than that asked for may properly be granted, he shall record a decision to that effect. On recording such decision, the Collector may, if the amount of the advance to be made does not exceed Rs. 1,000, at once grant a certificate for the advance under section 14 of the Act.

13. If the amount of the advance exceeds Rs. 1,000, the Collector shall report his decision to the Commissioner. If the advance does not exceed Rs. 2,500, it may be sanctioned by the Commissioner. If it exceeds that amount, it shall be reported to the Board of Revenue, who may grant it if it does not exceed Rs. 5,000. Advances of sums above Rs. 5,000 require the sanction of the local Government, and of sums above Rs. 10,000 that of the Government of India. The Collector, Commissioner, Board of Revenue, or local Government, may, on perusal of the records of the local inquiry, if they think that the advance should not be granted, refuse to grant it, or may order further inquiry, if they think fit to do so. On receipt of the orders of the authority competent to grant the advance, the Collector shall issue a certificate for the amount, if it be ordered to be granted.

14. When the Collector rejects the application for an advance, his decision shall be subject to appeal to the Commissioner, who may, if the

amount be within his competence to grant, disallow the rejection and direct the Collector to grant a certificate. If the amount be beyond his competence to grant, he shall report the case for the orders of the authority competent to grant it. Decisions by Commissioners rejecting applications shall similarly be open to appeal to the Board of Revenue, and those of the Board of Revenue to the local Government.

15. It shall be competent to the Commissioner, the Board of Revenue, or the local Government, to call for the record in any case, and to pass such orders thereon as may be within their competence respectively.

16. When the advance applied for does not exceed Rs. 1,000 no charge shall be made for serving such notices as it may be necessary to serve under sections 7 and 11 of the Act. When the advance applied for exceeds Rs. 1,000, but does not exceed Rs. 5,000, the serving of any notice which it may be necessary to serve shall be paid for by the applicant at a rate not exceeding half the rate required for the service of a notice by a revenue court in the district in which the land is situate. When the advance applied for exceeds Rs. 5,000, the rate shall be that fixed for serving a notice by a revenue court in the district in which the land is situate.

17. When a certificate is granted it shall be endorsed by the applicant to the effect that he has understood and agreed to all the terms, and it shall be signed by him in the presence of, and shall be attested by, two witnesses. If any property other than the property of the applicant is pledged or mortgaged as security for the repayment of the advance, the certificate shall be similarly endorsed, signed, and attested by the sureties and witnesses, and if the applicant is a tenant who cannot furnish security of the nature referred to in section 7 of the Act, the certificate shall be signed by his landlord and attested by two witnesses other than the landlord.

18. The certificate shall be retained in the office of the Collector; one copy shall be given to the applicant, and when advances are made payable at any tehsil or other subordinate district treasury, a copy of such certificate shall be sent to such treasury.

19. Except with the special sanction of the local Government, no advance of any sum not exceeding Rs. 500 shall be made unless it be repayable with interest within seven years from the date on which the advance is made, and no advance exceeding Rs. 500 shall be made with-

out such sanction unless it be repayable within 12 years from such date. If in any case the proposed period of repayment exceeds 20 years from such date, the sanction of the Government of India to the proposed advance must be obtained.

20. The interest charged on advances shall for the present be  $6\frac{1}{4}$  per cent. per annum.

21. The local Government may subject to the provisions of rule 20, make rules for the repayment of advances with interest and for regulating the instalments by which advances may be repaid and the place and time of repayment. Any person wishing to repay the advance received by him, or instalments of it, at an earlier date than that fixed in the certificate, may do so with the permission of the Collector.

22. All payments shall be made at the office of the officer in whose sub-division the land to be improved is situated. Such officer shall keep a register of advances and repayments in such form as the local Government may from time to time prescribe for that purpose.

23. Instalments may be suspended by order of the Commissioner for any reason that would justify suspension of the revenue demand. The Commissioner shall report the suspension to the Board of Revenue who, may pass such orders in the case as shall seem proper.

24. No project shall be divided. After an advance has been sanctioned, and the whole or part thereof expended, a second advance shall not be made without the sanction of the local Government.

25. No advance shall be made unless the value of the security offered exceeds by at least one-fourth the amount of the advance.

26. Subject to the orders of the local Government, the Collector shall make provision for the proper inspection of works in course of construction for which advances have been made, and for ascertaining and securing that such advances are duly applied to the purpose for which they were made.

27. The works and any accounts kept of the disbursements upon them shall be at all times open to the inspection of the Collector or other person authorized by him in that behalf.

28. In the case of advances exceeding Rs. 5,000, accounts shall be kept by the recipient of the advance in any form that the Collector may, with the sanction of superior authority, prescribe.

29. If at any time the Collector is satisfied that any person who has received an advance has failed to perform any of the conditions un-

der which it was made, he may, after recording in writing the grounds for the decision he has arrived at, and subject to the control of the superior revenue authorities, proceed to recover from such person, or from any security of such person, under the provisions of the Act, any sums which remain due, together with any interest payable thereon.

30. All works for which advances are made in a lump sum shall be inspected and reported on as soon as possible after the date on which their completion was directed in the certificate; all works for which advances are made by instalments shall be inspected and reported on before each instalment subsequent to the first is paid. No advances shall be given—

- (1) to any landowner who is in arrears for the land revenue, or for any advance under the Act;
- (2) to any tenant who is in arrears for rent, or for any advance under the Act.

### ASSUMPSIT.\*

Assumpsit, from the Latin *assumo*, is an *implied* contract, by which a man assumes or takes upon him to perform or pay anything to another, and to which he is bound upon the principles of equity and the just construction of law.

1. If I employ a person to transact any business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labour deserved. And if I neglect to make him amends, he has a remedy for this injury by bringing his action on the case; in which he is at liberty to suggest that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a sum, which valuation is submitted to the determination of a jury.

2. If one take up goods or wares of a tradesman, without expressly agreeing for the price, there is an implied understanding that the real value of the goods shall be paid, and an action may be brought accordingly.

3. Another implied undertaking is, when one has received money belonging to another, without a consideration given on the receiver's part; for the law construes the money received for the use of the owner only, and implies that the person so receiving it undertook to account

for it to the owner. And if he unjustly detain it, an action lies against him, and damages may be recovered. This is an extensive and beneficial remedy, applicable almost to every case where a defendant has received what, in equity and fairness, he ought to refund. It lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where any undue advantage is taken of the plaintiff's situation.

4. When a person has laid out and expended his own money for the use of another, at his request, the law implies a promise of repayment, and an action will lie on this undertaking. On this principle it is established that a surety in a bond, who pays the debt of his principal, may recover it by action on the assumpsit, for so much advanced for the use of the principal. But an action will not lie for money paid, when the money has been paid *against the express consent* of the party for whose use it is supposed to have been paid. Neither can money be recovered back when paid for carrying on an *unlawful* undertaking, as an unlicensed theatre, 10 *Bing.* 107.

5. Upon a stated account between two merchants or other persons, the law implies that he against whom the balance appears has engaged to pay it to the other, though there be not any actual promise.

6. The last class of implied contracts arises upon the supposition that every one who undertakes any office, employment, trust, or duty, contracts, with those who employ or entrust him, to perform it with integrity, diligence, and skill. And if, by the want of either of these qualities, any injury accrues to individuals, they have their remedy and damages by a special action on the case. A few instances will suffice.

If a public officer be guilty of a neglect of duty, or a sheriff or jailor suffer a prisoner in custody for debt to escape, or if an attorney betray or wilfully neglect the cause of his client, he is liable for damages.

With an innkeeper, there is an implied contract to secure his guest's goods in his inn; with a common carrier to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a tailor, shoemaker, or other workman, that he performs his business in a workmanlike manner; in which, if they fail, an action on the case lies to recover damages for such breach of their general undertakings. So, too, a surveyor being employed to survey and value premises, upon the security of which money is about to be advanced; if he, through ignorance or negligence, represent the value

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*of the security to be greater than it is, by which his employer is deceived, he is liable to an action for damages.*

But if a person be employed to perform any of these offices, whose common profession or business it is not, the law implies no such general undertaking : in order to charge *him* with damages, a special agreement is necessary.

If any one cheat me with false cards or dice, or by false weights and measures, or by selling me one commodity for another, an action lies for damages upon the contract : since the law implies that every transaction ought to be fair and honest.

In contracts, likewise, in sales, it is constantly understood that the seller undertakes that the commodity is his own. In contracts for provisions, it is implied that they are *wholesome* : otherwise, in either case, an action lies for damages.

## BOMBAY HIGH COURT.

### PRESENT :

Mr. Justice Westropp, Chief Justice, and Mr. Justice Nanabhai Haridas.

REG. vs. BUDHA NANKU\* and others.

*Evidence—Accomplice—Approver's testimony—Corroboration—Confession of co-prisoner.*

A conviction based on the testimony of approvers, uncorroborated as to the identity of the accused person, cannot be sustained ; and confessions of co-prisoners, implicating him cannot be accepted as sufficient corroboration of such testimony.

In this case the appellants were convicted on the testimony of two approvers who were not corroborated as to the identity of the appellants except by the confessions of other persons tried with them.

The Court (in delivering judgment said) :—

As regards the others, the Court quashes the convictions and sentences on the ground that the approvers Shripatray and Rama are not corroborated as to the identity of these latter prisoners. The confessions of co-prisoners implicating them cannot, in our opinion, be accepted as evidence to corroborate the testimony of these approvers : See 3 Russell on Crimes, 4th edition, by Greaves, pages 603, 604, and 605, *Reg. v. Malapat†* and *Reg. v. Chatur Purskotam*, decided on the 7th January 1876 by West and Nanabhái Haridás, JJ.

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\* *Vide* I. L. R., 1, Bom. Series, p. 475.

† 11, Bom. H. G. Rep., 196.

*Speeches of the Members of the Council\* of the Governor-General of India regarding the introduction of a Bill to define and amend the law relating to the TRANSFER OF PROPERTY.*

**THE HON'BLE WHITLEY STOKES :—**" As this is a convenient opportunity for stating the views of the Government on codification in India, I propose, with the permission of His Excellency the President, to trouble the Council with some remarks on the subject, premising that they are little but a precis of what learned and enlightened lawyers like John Austin and David Dudley Field have written in England and the United States. As no one ever does so, I need not acknowledge my obligations to their master, Bentham, of whom Talleyrand said *Pille de tout le monde il est toujours riche*.

" In the first place, speaking as I am in India, I feel myself relieved from the necessity of proving the possibility of successful codification. Thanks, chiefly, to the labours of Macaulay, Peacock, Maine, Stephen, William Macpherson (the Secretary to the late Indian Law Commission), and my wise and learned predecessor, to work under whom was not only a privilege, but an education, British India now possesses Codes on the following subjects :—

- I. Criminal Law (Act XLV. of 1860).
- II. Criminal Procedure (Act X. of 1872).
- III. Civil Procedure (Act VIII. of 1859).
- IV. Evidence (Act I. of 1872).
- V. Contract in General—Sale of Goods—Indemnity and Guarantee—Bailment—Agency—Partnership (Act IX. of 1872).
- VI. Limitation and Prescription (Act IX. of 1871).
- VII. Specific Relief (Act I. of 1877).

" These seven Codes apply to persons of every race and religion in British India. There are, besides, the following, which as yet apply only to limited classes of the population :—

VIII. The Succession Act (X. of 1865), which deals with domicile, wills and intestacies.

IX. The Divorce Act (IV. of 1869).†

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\* The Council met at Simla on Thursday, 31st May 1877.

† Besides these, we have comprehensive Acts which may be regarded as Codes, dealing with the following special subjects :—Public Companies (X. of 1866), the Post Office (XIV. of 1866), Telegraphs (I. of 1876), Merchant Seamen (I. of 1859), Sea Customs (VI. of 1863), Inland Customs (VIII. of 1875), Articles of War (V. of 1869), Stamps (XVIII. of 1869),



"Passing over the Specific Relief Act, which has not yet undergone sufficient probation, it is admitted by all unprejudiced and capable persons that, with one exception (the Code of Civil Procedure, Act VIII. of 1859, which will soon be replaced by Act X. of 1877), these Codes are working smoothly, and have been found reasonably adequate to provide for the cases that occur in the administration of the branches of the law with which they respectively deal.

"This being so, one might have supposed that no deliberate pause would have been made in the completion of this great and useful work. But such, unfortunately, is not the case. With the solitary exception of the Guardian and Ward Act XIII. of 1874 (which does not apply to Bengal, Madras, or Bombay), the codifying of our substantive law has since April 1872 totally ceased in India. We know the causes of this cessation, but it would not be expedient to state them.

"Under these circumstances it seems worth while to consider the current objections to codification, and to mention the advantages which may be expected from resuming the work.

"The current objections to codification are four in number. It is said—

(1) that a Code cannot provide for future cases—in other words, that it is necessarily incomplete ;

(2) that in the attempt to be systematic and concise, the language of codifiers must be left open to different interpretations ;

(3) that a Code is inflexible, and does not adapt itself to the expanding wants of the society for which it is framed ; and

(4) that the Codes which have been framed for foreign countries, in particular France and Prussia, have been failures.

"But these objections have often been answered. As to the first, it is true that a Code cannot provide for all cases, but is that any reason for not providing for as many as possible ? Moreover (as Austin points out), this objection is equally applicable to all law—whether it be a Code, a body of judiciary law, or a body of judiciary law supplemented by statutes.

Court Fees (VII. of 1870), Expropriation (X. of 1870), Coinage (XXIII. of 1870), Paper Currency (III. of 1871), Emigration (VII. of 1871), Ports and Port-dues (XII. of 1875), Administration by Public Officers of trust and intestate estates (XVII. of 1864 and II. of 1874). In a redistribution of the matter of our law, some of these Acts might form parts of what the New York codifiers call a Political Code.

“ The second objection—that the language of a Code must be open to different interpretations—is also equally applicable to judge-made law, the specimens of which manufactured in this country are certainly not always free from ambiguity. But the best reply to this objection is, that in India we can continue to follow the system of using concrete illustrations, and that our experience of the Penal Code shews that this method is admirably adapted to preclude uncertainty as to the meaning of the abstract propositions of which the bulk of a Code consists.

“ The objection as to the inflexibility of a Code seems as futile as those already discussed. It comes in India to this, that it is better for the barrister-judges (who, as a rule, lead the High Courts) to make the law as they go along, than for the legislature, aided as it is by the advice of every capable person in the country, to make the law as a guide beforehand. I feel as strongly as any one that the development of a country's law should be, as far as possible, the natural outgrowth of its material and social wants and of its highest ethical ideas. But for ascertaining these wants, for recognizing these ideas, the supreme Indian legislature is, and must always be, far more favourably situated than a body of judges whose experience is as a rule limited to their courts, who are generally ignorant of the languages of the people, and whose ability and learning (considerable as they are at present) will steadily deteriorate as the pecuniary attractions of India diminish. We should remember, too, that the machinery of Indian legislation is singularly swift and simple, and that as soon as the expediency of any amendment is established, there is no difficulty in having it at once effected.

“ The last objection—that certain foreign Codes have been failures, and that therefore all codification must fail—hardly requires to be answered. But the answer may as well be given. The Codes referred to—that of Napoleon and the Prussian Code of the Great Frederick—were first attempts, framed when the science of law-making was not understood as it is now. For instance, those Codes contain no definitions, technical terms, no explanations of leading principles and distinctions. The result is that they have not superseded the old law, and that they have had to be supplemented by numerous volumes of more or less authoritative interpretations. But such defects are obviously accidental, not inevitable, and they have been avoided in framing the recent German Commercial Code (*das allgemeine Deutsche Handelsgesetzbuch*, 1869) and Penal Code (*Deutsches Strafgesetzbuch*, 1870), the Italian *Codice*

*Civile* (which is an admirable model), Livingstone's Louisiana Codes, and, I believe, other Codes (those of Holland, Austria, Spain, Lower Canada, Portugal, Brazil), of which I do not speak positively as I have not seen them.

"Another objection (chiefly made by critics with a smattering of German jurisprudence) is that our Codes are not scientific enough; while a still larger body of critics, who are wholly innocent of law, declare loudly that they are too scientific, reminding one of those would-be military authorities who assert that already the arms put into the hands of infantry are superior to the average human capacity for using them with effect. But these criticisms are mutually destructive, and may be left without further notice.

"So much for the practicability of codification and for the objections usually taken against it. Now as to the expediency of continuing, and, if possible, completing the work which has been so well begun in India.

"First of all, it will save the Judges and Pleaders the vast amount of labour now forced upon them in searching for precedents in reports and text-books, which, in the mufassal at least, are seldom thoroughly understood. This, of course, will facilitate the despatch of business, cheapen the cost of litigation and in some places, perhaps, enable us to diminish the number of our Judges.

"Secondly, an untrained Judge (and most of our Judges in India are, and will probably always be, untrained) is far less likely to go wrong in construing a well-framed Code than in drawing inferences from a crowd of half-understood decisions, or in submitting to the guidance of English text-books, written solely with reference to the system of English law—a system from which we, in India, have widely diverged in many important particulars. It is obvious that the number of appeals will thus be greatly lessened, and one urgently needed reform of our system of civil procedure will thus be effected without depriving the Natives in any degree of a right which they have come to regard as an indispensable security.

"Thirdly, the reduction of the whole of our law to a Code would necessarily have the effect of precluding our barrister Judges (and our Civilian Judges misled by barristers) from introducing into India English technicalities and doctrines unknown to litigants and unsuited to this country. Even before the amalgamation of the Supreme and the

Sadr Court this practice had begun, and I could easily produce the most amazing rulings as to champerty, estoppel, laches, inadmissibility of oral evidence, and opening conditional sales which have become absolute. Since that amalgamation the technicalizing of our law has gone on with renewed vigour, and Your Lordship will remember that the Judicial Committee of the Privy Council has recently recommended us to abolish by legislation one of the doctrines so introduced.

“Fourthly, the process of codification affords an opportunity for settling, by legislative enactment, many disputed questions which the Courts would never be able to settle. Take one or two illustrations of what I mean. For years our High Courts had been disputing whether title could be acquired by positive prescription, and as to the time necessary to give an absolute right to the use of light, of a way, of water, or other easements. One learned Judge thought the proper time might be ‘four, five, or six years’; some said it was twelve; others twenty; others that the law applicable to India was the English law before the passing of the Prescription Act in 2 and 3 Wm. IV.; others that there was no law at all on the subject. The result was constant and ruinous litigation and great waste of time on the part of the Courts. At last the legislature interposed, and by two short sections (27 and 28 of Act IX. of 1871) settled the matter apparently for ever. So far as I know, not a single serious doubt has been raised during the past six years as to the meaning of these sections. Take, again, the subject of Majority. Hindus, Muhammadans, East Indians, Europeans, Jews, Parsis, had each a different law on this subject. The age of majority according to the Hindu law was, in Bengal, the commencement of the 16th year; elsewhere, the commencement of the 17th year. Then the Courts held that Natives under eighteen were minors for some purposes, but not for others. Till the legislature interposed the state of affairs might be described as insoluble doubt and endless expense and litigation. But the Maharaja of Vizianagram passed his Act (IX. of 1875), and in three months the Courts were happily relieved of a useless and time-consuming branch of their business. Take, again, the question as to what offences can legally be compounded. As to this the High Courts are hopelessly at variance. A single section would remove the difficulty.

“Fifthly, codification would be the safest and easiest method of introducing into the social law of the Natives reforms which are urgently needed, but which only a few of them are enlightened enough to de-

mand. Take, for instance, the abolition of infant marriages. The Courts would never venture to hold such marriages illegal; and the legislature might well hesitate to raise, by an isolated measure, such a storm of excitement as was produced by the Act (XXI. of 1850) declaring that rights should not be forfeited by loss of caste, or by the Act (XV. of 1856) permitting Hindu widows to marry again. But I believe that by a comprehensive measure dealing with the whole law of Husband and Wife, a measure framed with due regard to social needs and physiological laws, we might abolish infant marriages without meeting anything more than the trivial and transitory opposition of a few professional agitators. I mention this merely by way of illustration of my meaning. There is no intention of passing any such law.

"Sixthly, when we possess a complete Code the decisions of the Courts will necessarily be nothing but decisions as to its construction, and the system of reporting, which we have established for the four High Courts at the annual cost of about Rs. 50,000, may then be placed by the inexpensive practice of periodical communications from the Registrars of those tribunals to the Government of India in its Legislative Department. The amendments thus suggested could then be considered and (if approved) made by the legislature.

"I might dwell on other benefits sure to accrue from codification—the diminution of the bulk and expense of the libraries with which lawyers and judges must now be provided at their own cost, or at that of the Government; the improvement in the character of the legal profession which would result from making the law simple and scientific; the diffusion among the people of a more accurate knowledge of their rights and duties than could be obtained in any other manner; the effectiveness of good Codes as instruments of education; the beneficial influence which our Codes would exercise on the legislation of England and some, at all events, of her Colonies. But these results are remote and comparatively unimportant.

"I will now describe with some particularity the work which remains to be done before Indian law can be said to be completely codified.

"First, we have to finish and then to arrange our Code of the law of Contract. Here the following subjects have still to be dealt with: Sales of immovable property; Mortgages and charges on land; Leases; Fixtures; Settlements; Powers; Exchanges; Insurance (Marine, Fire, and Life); Carriers (Marine and Inland); Bottomry, Respondentia and

other liens on Moveables; Negotiable Instruments. All these subjects, with the exception of Exchanges, Carriers, and certain liens on Moveables, were handled by the late Indian Law Commission. We possess their drafts in the Legislative Department, and on one of these drafts the Bill which I now ask leave to introduce is founded.

“As regards the law relating to Persons, we already possess Acts dealing directly or incidentally with Minors and Lunatics, and no further legislation seems necessary at present in this respect.

“Save as regards the infractions provided for by the Penal Code, the law relating to Personal Rights is almost wholly untouched by our legislature. So far as regards the right of protection from bodily injury, defamation and insult, it would be most conveniently dealt with in a Code of the law of Torts or Actionable Wrongs; but to deal with Wrongs, one must obviously first know the correlative Rights, and as in many cases these have not yet been ascertained and declared. I would not now take up this subject of Torts.

“We then come to the law of Personal Relations, namely, Husband and Wife, Parent and Child, Guardian and Ward, Master and Apprentice, Master and Servant. So much of the law of Husband and Wife as relates to the solemnization of Marriage and to Divorce has already been codified so far as regards Christians and persons not professing the Christian, Jewish, Hindu, Muhammadan, Parsi, or Buddhist religion; and I have here only to suggest that it would be convenient to amalgamate the Marriage Acts III. and XV. of 1872, and to withdraw the anomalous power to grant marriage-licenses, which the Presidency High Courts now possess.

“As to Parent and Child, their respective rights and duties, our Statute-book is almost a blank; and some painful litigation as to the rights of fathers to the custody of their children has, consequently, been the result. The law on this subject might easily and usefully be codified; but of course the proposed measure should leave untouched Hindus and Muhammadans, whose parental rights—at all events in the Presidency towns—are secured to them by statute. It might fitly apply to Europeans domiciled in India, East Indians, Armenians, Jews, Native Christians, and probably Parsis.

“The law of Guardian and Ward is already codified, so far only as regards Europeans, their children and grand-children, in territories not under a chartered High Court, by Act XIII. of 1874. I would extend

this law to the rest of British India, and make it apply to the whole population except Hindus, Muhammadans, and perhaps Buddhists.

“ The law of Apprentices has been dealt with by Act XIX. of 1850 and a section in Act I. of 1859. But the law of Master and Servant is still uncodified, though various Acts (such as XIII. of 1859 and IX. of 1860), have been stuck patchwise on the mass of reported cases in which the bulk of it is contained. Many of these cases are contradictory : all (except to lawyers in the Presidency towns) are inaccessible ; and I think there is no subject which might more fitly be taken up and dealt with in a spirit of fairness to the employer as well as to the employed. Much of the harshness with which Europeans and East Indians sometimes treat Native servants is due, I am convinced, to the absence of any distinct, ascertainable law as to their respective rights and duties.

“ The law of property, which would stand next in a scientific arrangement of a Complete Civil Code, is to a large extent dealt with by one of the drafts already mentioned. There seems no pressing need for declaring the law as to certain matters not so covered, such as the property of the State and the ownership of animals wild by nature. There remain the three subjects—all of peculiar importance in India—of Trusts, Servitudes (or Easements) and Boundaries. As to Trusts, though one learned Judge has held (4 Beng. O. C. J. 231) that trusts cannot be created by Hindus, another learned Judge of the same High Court (*ibid.* 134) lays down (I venture to think correctly) that there is no country in the world where fiduciary relations exhibit themselves so extensively and in such varied forms as in India, and that possession of dominion over property, coupled with the obligation to use it, either wholly or partially for the benefit of others than the possessor, is familiar to every Hindu. Nevertheless we have no law on this subject save what is scattered through the library called the Equity Reports. Except so far as regards the acquisition of a prescriptive title, the law of Servitudes has also been left untouched by the legislature ; and the Indian Courts are consequently left to the guidance (when they can get it) of a host of English cases often conflicting and sometimes unintelligible. The subject of Boundaries in their civil aspect is also untouched save by some local laws dealing with petty matters, such as disputes and the erection and repair of boundary-marks.

“ The subjects of Shipping, Corporate Property Patents, Copyright and Trade-marks may also here be mentioned.. But with the exception

of Copyright, they have already been dealt with by the Indian legislature well enough, at all events, to render immediate codification unnecessary. As to Copyright, our present law (Act XX. of 1847) does not provide for works of the fine arts, photographs and lectures. It is also defective as to piracies by translations. Our law as to Patterns and Designs (Act XIII. of 1872) is a dead letter.

“ We now come to the law relating to the acquisition of Property, by (1) Occupancy or Prescription ; (2) Accession ; (3) Transfer *inter vivos* ; (4) Will ; and (5) Succession.

“ Prescriptive titles are sufficiently dealt with by the limitation Act IX. of 1871.

“ As to acquisition of property by Accession, we have no law as to Fixtures, except what may be revealed by English text-books. The Bill which I now ask leave to introduce deals, I hope, satisfactorily with this subject. The law of Alluvion and Deluvion is in a land like this, of huge, silt-laden and shifting rivers, obviously of the very first importance ; but it is still contained in an old Bengal Regulation (XI. of 1825), which is not only incomplete but obscure ; and which is encrusted with decisions of the late Sadr Courts, the High Courts, and the Judicial Committee of the Privy Council, many of which are conflicting. Moreover, it does not apply to Sindh, where I believe the only rules on the subject are certain executive orders which, under the Indian Council's Act, section 25, have gained the force of law. The law of Accession to Movable property is untouched, save by sections 155, 156, 157 of Act IX. of 1872.

“ Transfer *inter vivos* has, so far as regards sale of moveables, been dealt with by the Contract law, and will, as regards land, be dealt with by the Bill which I now ask leave to introduce, supplemented, as that measure will be, by the Registration Act. But the subject of Gifts *inter vivos* is as yet untouched, though Donations *mortis causâ* are dealt with by the Succession Act.

“ Acquisitions under Wills are provided for by Act X. of 1865, so far as regards Europeans, East Indians, Armenians, Jews, Parsis, and Native Christians ; so far, also, as regards Hindus in the Lower Provinces and the Presidency Towns. The testamentary portion of this Act might now, I think, usefully be extended to Hindus in the rest of British India. But on this matter the Local Governments must first be consulted.

“ Succession *ab intestato* is provided for by the same Act, so far as



regards the whole population except Hindus, Buddhists and Muham-madans.

“ I have hitherto said nothing as to the possibility or the expediency of codifying the Native laws. But as the Advocate General of Madras, in a book of which a large number of copies has been sent to the Legislative Department, proposes to codify “ the whole Hindu law ” —(including, I presume, the law of Ordeals),—a few remarks may be made on this subject.

“ There would obviously be great political danger and no practical advantage in codifying the Muhammadan law, which, as every one knows, is founded on the Kuran, and the Traditions and the Maxims which have been developed out of them.

“ Speaking roughly, the only parts of the Hindu law (by which I mean the inspired *Dharmasastra*) which are now administered by our Courts relate to Inheritance, Maintenance, Partition of undivided Property, Widow’s Estate, Mortgages and Adoption. I exclude the law of Hundis (Native bills of exchange), which, so far as I know, is not divinely revealed, but is merely part of the custom of Hindu merchants. There are serious difficulties in the way of touching any of these laws : first, because they are all believed to be founded on a divine revelation, and great suspicion would certainly be excited if we *mlechchhas* attempted to meddle with them ; secondly, because they vary, more or less, in Bengal, Madras and Bombay (take, for example, the power of a widow to adopt a son to her deceased husband), and uniformity, one great object of a Code, could not therefore be secured save with the certainty of change and the probability of such irritation ; thirdly, because many of the sources of the Hindu law have either not been translated at all, or (like the *Vyavahara Mayukha*) translated so badly as to mislead rather than guide ; fourthly, because even supposing we succeeded in codifying the Hindu law, the result would certainly not be applicable to the Hindus and Sikhs of the Panjab, nor to the non-Aryan and non-Brahmanic population of the south of India, nor, I believe, to the Hindus in the Central Provinces, where local custom overrides Bramanic jurisprudence, nor to the aboriginal hill tribes anywhere ; lastly, because by codification we should stereotype laws which, however interesting from the archæological point of view, have (like all laws based on theological ideas) something irrational and inhuman about them. For instance, suppose we codified the Hindu law of Inheritance, we should have to found it on

the notion that the right of each relation to succeed depends on his comparative efficacy in performing the obsequies of the deceased, and we should consequently have to exclude sons who chanced to be either blind or deaf and brothers who were addicted to any vice. Suppose, again, we codified the Hindu law of Adoption, we should have to declare that an orphan could not be adopted, because, forsooth, there is no one to give him to his adoptive parent (2 Madras High Court Reports, 129). This surely is not the kind of jurisprudence that a civilized nation should try to perpetuate. The wisest, and, I believe, the most welcome measure that could possibly be passed affecting the Hindus would be an Act enabling them to discard their own law of property—in other words, to adopt (without prejudice to vested rights) the legal status of Europeans domiciled in India, the change of status being formally registered, publicly announced, and, when once made, absolute and irrevocable. This suggestion is immediately due to Mr. J. D. Mayne's paper (*Madras Journal of Literature and Science*, 1864-65) on the administration of Native law in the Courts of the Madras Presidency, the ablest essay that I have ever read on the subject of the law which should be applied to a conquered nation. The ultimate source of the suggestion is of course the well known decision of the Privy Council in *Abraham v. Abraham*, 9, Moore, I. A., 195.

“ I have thus, I hope, shewn —

- (a) that laws may be successfully codified in India,
- (b) that the current objections to codification are groundless,
- (c) that it is expedient to continue the work of codification except as regards the native laws,
- (d) that much remains to be done before that work is complete.

“ In determining the order in which subjects should be taken up for codification, we should of course be influenced more by the actual wants of the country than by any love for logical arrangement, legal symmetry or scientific completeness. Bearing this in mind, we should, I think, first take up the three Bills which the late Indian Law Commission framed with a view of completing their Code of Contract law (Act IX. of 1872). These are :—

“ The Transfer of Property Bill, which deals with sales of land, mortgages, leases, fixtures, settlements, and powers, and which I now ask leave to introduce.

“ The Insurance Bill, which deals with fire, life, and marine insurance.

“ The Negotiable Instruments Bill, which deals with Bills of exchange, cheques and promissory notes, and which we propose to make an embodiment of the actual law on the subject in India and England.

“ These three Bills no doubt require considerable modifications, but they could in a few months be made most useful measures, and would be welcomed by every one whose interest is not to keep the law obscure and inaccessible. The subject of Fire, Life and Marine Insurance is one of growing importance in India, but (like the law of Master and Servant) it is contained in about two thousand reported English cases, patched with four Acts of the Indian Legislature. The Natives have no other law on this subject, though I believe that Hindu merchants have a custom of insuring goods sent by land or river from one part of British India to another. As regards Negotiable Instruments, no doubt, we should abstain from contravening the custom of Hindu merchants as to hundis. But the proposed law need not be inoperative as to these instruments, for the Calcutta High Court has held that when the analogy between hundis and bills is complete the English law applies. The opportunity too might be taken to remove the doubts whether a hundi payable to order is negotiable without the written endorsement of the payee (1 Hyde, 155); whether notice of dishonour is necessary in the case of a hundi (Coryton, 88). Of course the provisions as to cheques and promissory notes would extend to Natives as well as Europeans.

“ We might then take up the subject of Master and Servant, to which I have already referred. The opportunity might be used to amend the law as to the right of servants to compensation for injury caused by the negligence of foremen in their masters' employment, and to enable the Local Governments to establish a system of registering domestic servants.

“ The subjects of Alluvion and Diluvion might then be dealt with. In Lower Bengal, in the Panjab and in Sindh a clear and comprehensive law on these subjects is very necessary, and the text-books in the library of the Legislative Department by American and Italian writers would aid us effectively in working up the decisions of the Indian Courts and the Privy Council.

“ I would then take up the law of Servitudes or Easements. The subject is, no doubt, most difficult and complicated. But we have the

materials collected in England by Mr. Goddard, one of the gentlemen lately employed under a Royal Commission to prepare a specimen Digest, and we should doubtless receive on such a matter useful suggestions from the local authorities.

“ We might then deal with Boundaries. An Act of a very few sections would contain all the rules that are needed on this subject, such as rules as to lateral and subjacent support, trees growing on or near boundaries, the rights of owners of land bordering upon water or bounded by roads, the duties of conterminous owners to maintain boundaries and fences.

“ When these measures have been passed, it will be found that the Rights of the population will, to a large extent, have been ascertained and declared. Then (but not till then) we should take up the subject of Torts or Actionable Wrongs, laying down clear rules as to the measure of damages in the case of each. It has been objected (strange to say by a Judge of the Calcutta High Court) that a Code of the law of Torts would suggest kinds of litigation now very rare, if not wholly unknown in India. What if it would? Because the people are now unaware of the existence of their power to obtain redress by civil suit from those who infringe their rights, are we always deliberately to keep them in ignorance of such power?

“ But let us examine the learned Judge's vague prophecy. The most cursory inspection of our law reports will shew that the Natives are in the habit of suing for each of the three great classes of wrongs, namely, wrongs to the person (such as assault, malicious prosecution, libel, slander), wrongs to immoveable property (such as trespass, stoppage of water, obstruction of lights), wrongs to moveable property (such as wrongful distress, wrongful attachment, false representation).

“ Besides these, the Indian legislature has expressly recognized or provided for suits for loss of caste which, I presume, means suits for compensation for expulsion from caste (Act VIII. of 1859, section 298), false imprisonment (IX. of 1871, schedule II. No. 21), seduction (*ib.* No. 27), obstructing ways and diverting water-courses (*ib.* Nos. 31, 32), taking, damaging or wrongfully detaining moveable property (*ib.* Nos. 26, 33, 34), misuser of property (*ib.* No. 38), infringement of patents (XV. of 1859, sections 22, 23) and of copyright (XX. of 1847, section 7), death caused by actionable wrong (XIII. of 1855), negligence of carriers (III. of 1865, sections 7 and 8), cattle trespass (I. of 1871, Chapter

VII), damage done to goods in a bailee's possession (IX. of 1872, section 180), injury caused to an agent by his principal's neglect or want of skill (IX. of 1872 section 225). It must be admitted that the whole of the English law of torts, except perhaps the law relating to slander of title, has been introduced into, and is actually administered in British India; and if, in codifying that law, it be thought desirable to declare that certain injuries for which an action would now lie in England should not be actionable in India, what can be easier than to do so? I do not know what those injuries are, nor, I suspect, does the learned judge; but we ought to make three amendments in our law of torts: first, we should bar suits, or mere oral abuse (6 Beng. Appendix 99); secondly, we should finally get rid of suits for criminal conversation, which may apparently still be brought by Hindus; and thirdly, we should alter the law in the Presidency towns so as to allow an injured person to bring a civil suit without instituting criminal proceedings.

"The outline of a complete Civil Code would then be nearly filled in. There would remain the subjects of Parent and Child, Trusts, Gifts *inter vivos*, Accession to Moveables, certain Liens on Moveables, Carriers (Marine and Inland). The order of dealing with them is unimportant.

"The difficult task of arranging scientifically the various chapters of the Civil Code thus produced would then remain; and to the finished work we should either prefix or subjoin a chapter containing rules for its interpretation. The materials for this chapter are already collected in the works of Dwarrris, Maxwell, and the American Sedgwick; and its enactment would afford a good opportunity for getting rid of the pernicious and illogical distinctions between the modes of construing remedial statutes, penal statutes, and statutes imposing charges on the subject, which have been imported from England by judges more familiar with the common-law than impressed by the importance of giving effect to the wishes of the legislature.

"And now, my Lord, I have nearly done. In carrying out this great work of codification, the Government of India is well aware that it will meet with the hostility of many and (what is worse) the indifference of most of those for whose sake it is undertaken. Some of the judges will, I fear, oppose codification, because when once it is achieved it will limit their discretion and reduce them from their present position of judicial lawgivers to the comparatively humble but useful employment of interpreting and carrying out the will of the legislature. The baser sort of

my own profession (not, I am glad to say, the more enlightened and unselfish members of it) will naturally oppose everything that tends to make the law clear and accessible, and thus to diminish litigation. The Indian public will doubtless be as indifferent to codification as the English public has hitherto proved to be. Nor can Your Lordship, or any of my colleagues, or I myself, hope to earn the fame which is justly due to those who finish a vast and useful work. For the measure which I have sketched out cannot possibly be prepared, criticised and passed into law in less than nine years, and before that time expires we shall all, so far as India is concerned, have attained to official *nirvana*. But let the judges and lawyers be comforted with the assurance that we shall alter as little as may be the substance of the laws with which they are so familiar. The Eumenides shall not say to us, as they said to the younger gods, ‘Ye have overridden the ancient laws (*palaious nomous kathippasasthe*).’ Let the public be consoled with the pledge that no pains will be spared to make our drafts clear, brief and accurate, and that all competent criticism will be heartily welcomed and carefully utilised. And for us, my Lord, let us be satisfied with the consciousness that we shall have resumed, and to some extent carried out, the policy of providing a simple, compact and uniform system of law for the countless millions who now are, and hereafter will be, living and working and gathering wealth, gaining legal rights and incurring legal liabilities, under the beneficent rule of the Empress of India and her successors.”

His Excellency the President said : “The very able exposition of principles, and the lucid and interesting narrative of facts, which the Council has just had the advantage of hearing from the Hon’ble Member, who has asked leave to introduce this Bill, make it unnecessary for me to remind Hon’ble Members that the Bill is part of a great undertaking, and that this undertaking, commenced by men of great eminence and ability, has been for some time suspended. But I believe I am in a position to inform the Council that the Government of India now resumes the task of codifying the substantive law of India, not only with the sanction, but I think I may say with the sympathy, of the present Secretary of State. This is an encouraging fact. \* \*

“My hon’ble colleague has reminded us that codification has been regarded, not only with reluctance, but with some degree of mistrust, by a large and influential body of legal opinion, which has lent its authority to confirm the impression that codification is either not feasible,

or, if it be feasible, not beneficial. However, I noticed with considerable satisfaction some months ago that the Chief Justice of England—of whose genius and patriotism all England is justly proud—did not hesitate, in a public speech he then made, to declare that, in his opinion, the time had come for England herself to follow the example of other civilized States, and make haste to get rid of what a great English Poet has called :

‘ the lawless science of our law,  
That codeless myriad of precedent,  
That wilderness of single instances.

“ Now it so happens that my own official life, although wholly unconnected with the legal profession, has led me at various times to reside in different continental countries, all of which already possess a completed Civil Code. For instance, I may mention France and Prussia, to which my hon’ble friend has referred, also Austria, Portugal, Italy and Denmark ; which latter country was—according to Bentham—the first in Europe to codify its law. Perhaps, then, I may be allowed to record the fact that, in all these countries, codification has been found to be not only feasible but exceedingly beneficial to the whole community, and very conducive to the comfort of all classes. I am quite certain that, both in Prussia and France, the present Civil Code, as now revised and amended, is regarded by the whole population as one of the greatest blessings which Government could have given it. Therefore, I think I am entitled to congratulate my hon’ble colleague, Mr. Stokes, upon having inaugurated his administration of the great Department of Government over which he now presides by the question which I have now put to the Council.”

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## MADRAS HIGH COURT.

*The 28th November, 1876.*

FULL BENCH :

Before Sir W. Morgan, C. J., Mr. Justice Holloway, Mr. Justice Innes, and Mr.  
Justice Kindersley.

REG. *vs.* MUTHAVAN\* and four others.*Criminal Procedure Code, sec. 188.*

The offences of enticing away a married woman with a criminal intent and of criminal breach of trust are not offences which may lawfully be compounded.

Upon a reference, by the District Magistrate of Tinnevely, of the Proceedings of the 2nd-class Magistrate of Tuticorin in Cases Nos. 275 and 277 of 1876, Counsel not appearing,

The High Court passed the following

RULING.—In the cases reported the 2nd-class Magistrate has allowed prosecutions for the offences of enticing away a married woman with intent to have illicit intercourse, and of criminal breach of trust, respectively, to be withdrawn under Section 188 of the Code of Criminal Procedure.

The District Magistrate submits that the offences in question are not offences which may lawfully be compounded. The High Court agree that the offences of enticing away a married woman with a criminal intent and of criminal breach of trust are not offences which may lawfully be compounded. The circumstances of the cases brought to notice are, however, such as to render active interference on the part of the High Court unnecessary.

[Upon the general question of what offences may be lawfully compounded see *Reg. v. Rahimat*, I. L. R. 1 Bom., 147 (Full Bench) and note.]

## BOMBAY HIGH COURT.

*The 15th December, 1876.*

PRESENT :

Mr. Justice Westropp, C. J., and Mr. Justice Sargent.

NATHA HIRAT† and another (Plaintiffs),

*vs.*

JANARDHAN RAM CHUNDRA and another (Defendants.)

*Limitation—Act IX. of 1871, Schedule II., Cl. 72—Promissory note  
—Novation.*

The holder of a promissory note, payable on demand, dated 14th April 1870, demanded

\* *Vide* I. L. R., 1, Madras Series, p. 191.

† *Vide* I. L. R., 1, Bom. Series, 503.



payment on 8th December 1872. The maker then paid interest in advance up to 1st April 1873, upon the condition that the holder should make no demand until that date.

*Held* that this transaction amounted to the substitution of a new contract for that contained in the promissory note; that the period of limitation must be reckoned from 1st April 1873; and that, consequently, a suit to recover the balance due on the note, instituted on 27th March 1876, was not barred.

The following case was stated for the opinion of the High Court in accordance with Section 55 of Act IX. of 1850 by J. O'Leary, First Judge of the Court of Small Causes at Bombay :—

“ 1. The action in this case was brought for the recovery of a balance alleged to be due by the defendants to the plaintiffs on a promissory note, bearing date 14th April 1870.

“ 2. The said note purported to be payable on demand.

“ 3. The first unqualified demand on the note was made on or about the 8th December 1872.

“ 4. This suit was instituted on the 27th March 1876.

“ 5. The defendants pleaded the Law of Limitation as a bar to the claim, the first absolute demand having been made more than three years before the institution of the action.

“ 6. The plaintiffs contended that the period of limitation ought to be computed from 1st April 1873, and relied upon the following facts (which were proved to the satisfaction of this Court) in support of their contention :—

(a) On the 8th December 1872, the defendants made a proposal to the plaintiffs, which, translated into English, was in the following words :—

‘ We pay you now interest up to the 1st April 1873.

You are not to make any demand upon us until the 1st April 1873.’

(b) The plaintiffs at once accepted this proposal.

• (c) The defendants, immediately on the plaintiffs’ acceptance of their proposal as aforesaid, paid to the plaintiffs interest on the note up to the 1st day of April 1873.

(d) At the same time one of the defendants (Janardhan Ramchandra) with the knowledge and consent of his co-defendant wrote a memorandum upon the note in the following form :—

‘ 8th December 1872, paid interest up to 1st April 1873.’

“ 7. During the interval of time that elapsed between the 8th

December 1872 and the 1st April 1873, the plaintiffs made no demand for repayment of the amount secured by the note.

" 8. Upon this evidence the Fourth Judge who tried the case disallowed the plea of limitation and gave judgment for the plaintiffs for the amount claimed.

" 9. The defendants obtained a rule *nisi* for a judgment in their favour on the ground that the Fourth Judge was in error in holding that the plaintiffs were entitled to sue within three years from 1st April 1873.

" 10. The First and Fourth Judges, before whom the rule *nisi* came on for argument, discharged the rule subject to the opinion of the the High Court, which we have now the honour to solicit upon the question,

" Whether the plaintiffs were entitled to bring their suit within three years from the 1st April 1873 under the circumstances stated in this case?"

The reference was considered by Westropp, C. J., and Sargent, J.

There was no appearance of the parties either in person or by counsel.

**PER CURIAM** :—We think that the transaction of the 8th December 1872 amounted to the substitution of a new contract for that contained in the promissory note of 14th April 1870, under which new contract the plaintiffs, in consideration of a payment of interest in advance up to the 1st April 1873, agreed to defer their demand for the principal, and to forbear to sue until that day. Hence the period of limitation must be reckoned from that day, and the suit, having been brought on the 27th March 1876, is not barred. The verdict, therefore, should stand.

## HIGH COURT, N. W. P.

*The 16th December, 1876.*

PRESENT :

Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

ILAH BAKSH and others (Defendants)\*

vs.

IMAM BAKSH and others (Plaintiffs.)

*Act VIII. of 1859, ss. 7, 97—Omission of part of Claim—Withdrawal of Suit—Institution of Fresh Suit, including part of Claim omitted.*

Where the plaintiffs in a suit were permitted to withdraw from the same, with a view to bringing a fresh suit which should include a portion which had been omitted of the claim arising out of the cause of action, and such fresh suit was brought, the additional portion of the claim in that suit was not barred by s. 7 of Act VIII. of 1859.

THE COURT (In delivering judgment said):—As to the first plea, it would seem that the reason for which the former suit was withdrawn was that a fresh suit might be brought which should include a portion which had been omitted before of the claim arising out of the cause of action, and the permission to bring the new suit must be reckoned to be permission to supply the former omission. This being so, we are of opinion that the additional portion of the claim in this suit is not barred by s. 7, Act VIII. of 1859. A similar view was taken in special appeal case No. 180 of 1876, decided by a Bench of this Court on the 28th April last.<sup>1</sup>

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<sup>1</sup> In that case the application for permission to withdraw the former suit was based on the ground that a portion of the claim arising out of the cause of action had by mistake been omitted to be included in the plaint with which that suit had been commenced, and on that ground permission for the withdrawal of the suit, and to bring a fresh suit was accorded. Under these circumstances the Court (Pearson and Spankie, JJ.) was of opinion that it would not be fair or reasonable to hold that the aforesaid portion of the claim could not be entertained in the fresh suit, although it might be true that the defect in the former plaint might have been amended without recourse to the provisions of s. 97 of Act VIII. of 1859.

\* Vide I. L. R., 1, All. Series p. 324.

## PRIVY COUNCIL.

*The 9th, 16th, 17th and 18th May, 1876.*

PRESENT :

Sir James W. Colville, Sir Montague E. Smith, and Sir Robert P. Collier.

*On Appeal from Calcutta High Court.*KHAJOORONISSA\* (Defendant) *Appellant*,*versus*ROWSHAN JEHAN (Plaintiff) *Respondent*.*Compromise—Appeal—Fraud—Mahomedan Law—Devolution of Property—Deed of Gift—Will—Presumption of Marriage.*

In a suit brought on behalf of an infant daughter by her mother as guardian, a decision was given partly for and partly against the defendant, who there upon filed an appeal, which he afterwards withdrew in accordance with the terms of a compromise purporting to have been made with the mother and daughter. Subsequently, at the suit of the daughter, the compromise was set aside as fraudulent and collusive, and a review of the original decision, in so far as it was adverse to the plaintiff's interest, was allowed. The defendant then applied that his appeal might be revived, but his application was rejected by the High Court, on the ground that he had deprived himself of his opportunity of appeal by his own fraudulent conduct. *Held*, by the Judicial Committee, that the effect of setting aside the compromise was to remit both parties to their original rights, and that if the plaintiff was to be allowed to be heard against so much of the original judgment as was unfavorable to her, the defendant must similarly be heard against so much of the same judgment as was unfavorable to him.

The policy of the Mahomedan law is to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs. But a holder of property may defeat the policy of the law by giving in his lifetime the whole, or any part, of his property to one of his heirs, provided he complies with certain forms. This may be done by a deed of gift without consideration, or by deed of gift for consideration. A conveyance by deed of gift without consideration is invalid, unless accompanied by delivery of the thing given so far as it admits of delivery. In the case of a gift for consideration, the delivery of possession is not necessary for its validity, and no question arises as to the adequacy of the consideration; but there must be an actual payment of the consideration by the donee, and a *bona fide* intention on the part of the donor to divest himself *in presenti* of the property and to confer it on the donee. It is incumbent on those who set up transactions of this nature, to show very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been strictly complied with.

By the Mahomedan law, a testator may bequeath one-third of his estate to a stranger, but cannot leave a legacy to one of his heirs without the consent of the rest. A will purporting to give one-third of the testator's property to one of his sons as his executor, to be expended at the son's discretion in undefined pious uses, and conferring on such son a beneficial interest in the surplus of such third share, *held* to be an attempt to give, under color

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\* *Vide* I. L. R., 2, Calc Series, p. 184.

of a religious bequest, a legacy to one of the testator's heirs, and to be invalid without the confirmation of the other heirs.

Where a son has been uniformly treated by his father and all the members of the family as legitimate, a presumption arises under the Mahomedan law that the son's mother was his father's wife.

SIR ROBERT P. COLLIER :—This case, which fills a great mass of printed paper, and has occupied much time, finally resolves itself into a few points not attended with any very great difficulty. In order to make those points intelligible, a short history of the whole case appears to be necessary. Rajah *Deedar Hossein* died in 1841, possessed of half of the large zemindary of *Soorjapore*. He left five sons and five daughters. According to the contention of the one side he left five widows; according to the contention of the other side he left one wife and four concubines. *Enayut Hossein*, his eldest son, possessed himself of all the property of the deceased Rajah by virtue of two documents which he set up, and which will have to be referred to subsequently, one being a deed of gift as it is called, and the other a will, both dated the 18th of November, 1839, about two years before the death of the Rajah.

The first document purported to convey to *Enayut* one-third of the zemindary. The will may be shortly described as giving to *Enayut Hossein* a third of what remained, burdened with a trust of a somewhat indefinite character for pious uses, but with a bequest of the residue after those pious uses had been satisfied to the beneficial use of *Enayut* himself. *Enayut* was put into possession of the whole of the landed property, and it was directed that the other children were not to be enabled to sell or dispose of their shares in any way. *Enayut* was to pay them certain annuities, which he does not appear to have done, and it was only of the personal property that a division was directed in accordance with the Mahomedan law. By virtue of these documents *Enayut* took possession of the property of his father, and appears to have reduced the other members of the family to a state of poverty. He struggled for some time to obtain mutation of names, in pursuance of these documents. The mutation was opposed by other members of the family, but was finally obtained in 1844 upon *Enayut* giving security. After that time some abortive suits were instituted by different members of the family *in forma pauperis*; but the first proceeding necessary to notice at all at length, is a suit instituted by *Khoobunissa*, who was the widow of *Nuzeroodeen*, the third son of Rajah *Deedar Hossein*, in 1852,

as guardian and protector of her infant daughter *Rowshan Jehan* (the present Plaintiff), to set aside both the deed and the will, and to obtain possession on behalf of her daughter of a fourteen annas share (the daughter's share) of the property of *Nuzeeroodeen*. She appears to have also brought a suit for the other two annas on her own behalf.

This suit came to be heard before Mr. *Lock*, who was the Judge at *Purneah* in 1855. His decision was to the effect that both the documents, the deed and the will, were in fact executed by the Rajah *Deedar*; that the deed was valid, but that the will was invalid because it had not obtained the consent of the heirs other than *Enayut*, which according to his view of the will was necessary by the Mahomedan law. *Enayut Hossein* appealed against that decision, and *Khoobunissa* would have had an undoubted right to her cross appeal but for what subsequently transpired. Pending this suit, which was decided in 1855, *Enayut Hossein* had instituted a cross suit against *Khoobunissa* for the purpose of carrying into effect an alleged compromise to which he said she was a party, he alleging that she had received some Rs. 31,000, and had executed a document compromising the suit in his favour. This she denied. Issues were raised upon it, and this case came on for trial in August, 1856, rather more than a year after the other decision. But on the 30th of August of that year a compromise, which in some respects may be undoubtedly called a real compromise, was come to. *Khoobunissa* then filed a document, in which she declared that she would not any longer contest the questions between her and *Enayut Hossein*; that she had received certain money from him, and agreed altogether to his terms, and in that document there was a statement that her daughter *Rowshan Jehan* assented to this compromise. *Rowshan Jehan* was also represented as a party to the transaction, and as asserting herself to be of age. That compromise was given effect to by Mr. *Lock*; it was also given effect to by the Sudder Dewanny Adawlut Court, which dismissed the appeal, and gave a decree in the terms of it in December, 1856. .

*Rowshan Jehan*, the present Plaintiff, in 1859 married *Syud Ahmed Reza*, a member of the other branch of the family, who possessed the half of the pergunnah *Soorjapore* other than that which was held by *Deedar Hossein*; and in 1860 she filed a suit, in which she asserted that she was no party to and had no knowledge of the compromise between *Enayut* and her mother, and that it was effected by fraud and collusion on the part of both of them.

be set aside, and she prayed in substance for a review of the judgment of Mr. *Lock*, so far as it was against her. She made also three further claims; the first to a share derived by her father from his brother *Edoo Hossein*, who had died before him, the second to a share in right of her grandmother, *Bibee Loodhun*, whom she alleged to have been a wife of *Deedar Hossein*. She thirdly claimed that there should be added to the whole zemindary property a portion which *Enayut Hossein* had recovered by a decree of this Board against the *Rezas*, in respect of the right of his grandmother *Ranee Sumree*. It may be as well at once to dismiss this part of the case, by stating that it is not now denied on the part of *Enayut* that he recovered this sum, not in his own right, but as a trustee for all the other members of the family.

This suit appears to have been deplorably dealt with in the inferior Courts of India. It came first before Mr. *Beaufort*, who framed a certain number of issues, and proceeded as far as deciding the issues in bar. Then it came before Mr. *Birch*, who upset all that Mr. *Beaufort* had done, and dismissed the suit altogether in a summary manner, on the ground that the cause of action was not stated with sufficient precision. The High Court set this mistake right by remanding the cause to be retried; whereupon it came before Mr. *Simson*, who had succeeded Mr. *Birch*. Mr. *Simson*, who seems to have very imperfectly apprehended the nature of the suit, framed an issue, which by no means decided it, and after his trial (if it can be so called) of the case, it came before the High Court again, and was again remanded. This occurred in January or February, 1864, when a very careful and luminous judgment was given by the Chief Justice Sir *Barnes Peacock* and another member of the Court, which it is now necessary more particularly to refer to. The High Court, after stating that the case had not been properly tried or even apprehended, remanded it for the following issues to be tried, in addition to the one laid down by Mr. *Simson*, which was as to the validity of the deed. "1. Was the Plaintiff of age according to the Mahomedan law, independently of Regulation XXVI. of 1793, at the time when the alleged compromise was effected? 2. Did the Plaintiff execute the documents which purport to have been executed by her, or any and which of them? 3. If so, was she induced to execute the same by means of fraud or misrepresentation? 4. Was the compromise a fair one and beneficial to the Plaintiff? 5. Did the Plaintiff receive any portion of the money alleged to have been paid

by the Defendant or any portion of the profits of the putnee talook? 6. Did the Plaintiff's mother *Khobunissa* receive the money? 7. Were all or any and which of the receipts, alleged by the Defendant in his written statement to have been executed by the Plaintiff, executed by her? 8. Was the decree in the Zillah Court of *Purneah* of the 30th of August, 1856, establishing the receipt for the Rs. 31,400, obtained by fraud or misrepresentation? 9. Was the decree of the Sudder Court of the 10th of December, 1856, founded on the alleged compromise, obtained by fraud or misrepresentation? 10. If not, was it binding on the Plaintiff as carrying out an arrangement beneficial to her, which her mother, as her guardian, was competent to enter into?" The High Court proceed to say, "These are the issues which we consider necessary for a proper determination of the Plaintiff's right to set aside the decree of the Sudder Court. It appears to us that this appeal is in the nature of a bill for a review of judgment, and therefore when the decree is set aside by virtue of a regular suit, the same rights will arise as if the Court upon review of judgment had set aside its own decree." Then they go on to say: "The above issues will apply of course to the Plaintiff's claim only so far as affects that portion of *Deedar Hossein's* property which was the subject of the former suit, but they do not apply to the shares which belonged to her uncle and her grandmother, or to the share of the property recovered by the Defendant by the decree of the Privy Council. These are wholly distinct matters from that at issue before Mr. *Lock*, and therefore as to them we think it proper to lay down the following issues to be tried by the Judge." Then come six more issues: "1. Did the father of the Plaintiff survive her uncle *Edoo Hossein*, and is the Plaintiff entitled to recover any and what portion of the share, if any, of her uncle *Edoo Hossein* in the estate of the Plaintiff's late grandfather *Rajah Deedar Hossein*? 2. Did *Edoo Hossein* receive the allowance given by his father's will, or assent to the will? 3. Did the Plaintiff's grandmother, *Mussamut Bibee Loodhun*, alias *Saemah*, succeed to any and what portion of the estate of *Rajah Deedar Hossein*? 4. Did *Bibee Loodhun* take the allowance as alleged in the Defendant's written statement? 5. Is the Plaintiff entitled to recover any and what portion of *Bibee Loodhun's* share, if any, of *Rajah Deedar Hossein's* estate? 6. Is the Plaintiff entitled to recover any and what portion of the one anna eight gundas share of the zemindary of *Soorjapore*, recovered by the Defendant under decree of the Privy Council dated the 11th of July, 1859?"



All the first ten issues which related to the validity of the compromise in the suit which was heard before Mr. *Loch*, and came before the Judder Dewanny Adawlut, were decided by the Judge, Mr. *Muspratt*, before whom this case came on its remand, in favour of the Plaintiff. With respect to the latter issues, the Judge found against the Plaintiff upon the question of *Edoo Hossein* surviving his brother *Nuzeeroodeen*, her father, and he found against her on the question of her right to succeed to any portion of the property of her grandmother *Bibee Loodhun*. The case came on appeal before the High Court, who gave a very elaborate judgment in January, 1866. The High Court agreed with the learned Judge of the Zillah Court in his finding on all the ten issues relating to the compromise, and there being two concurrent findings upon these issues, which are questions of fact, their Lordships are by no means disposed to disturb them. Indeed, it has scarcely been argued that, giving effect to the rule on this subject, they should be disturbed.

The High Court next came to the conclusion that the compromise being set aside, owing to fraud and collusion on the part of part of *Enayut Hossein*, *Enayut Hossein's* right of appeal against Mr. *Loch's* judgment was not revived, whereas the right of appeal on the part of the Plaintiff *Rowshan Jehan* was revived. From that finding their Lordships differ. It appears to them that the effect of setting aside the compromise was to remit both parties to their original rights, and that if the Plaintiff is to be allowed to be heard to appeal against so much of the decision of Mr. *Loch* as is against her, *Enayut Hossein* ought to be heard to appeal against so much of the decision as is against him. The High Court further affirm the decision of Mr. *Loch* on the subject of the will, which was in favour of the Plaintiff, but they reverse his decision so far as it concerns the deed, which was against her. Further, they reverse the decision of Mr. *Muspratt* upon the two questions of the right of the Plaintiff to succeed to *Edoo Hossein*, and her right to succeed to her grandmother. The case, therefore, reduces itself to four questions,—first, the validity of the deed; secondly, the validity of the will; thirdly the survivorship between *Edoo* and *Nuzeeroodeen*; and, fourthly, the Plaintiff's right to succeed to her grandmother.

The policy of the Mahomedan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specific portion, as much as a third, to a stranger. But it also appears that

holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms. It is incumbent, however, upon those who seek to set up a proceeding of this sort, to shew very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been complied with. There is no question of the execution by Rajah *Deedar Hossein* of this deed giving one-third to his son *Enayut* on the 10th of November, 1839. The deed was either—to use English expressions—a deed of gift simply, or a deed of gift for a consideration. If it was simply a deed of gift without consideration, it was invalid unless accompanied by a delivery of the thing given, as far as that thing is capable of delivery, or, in other words, by what is termed in the books a seisin on the part of the donee. In their Lordships' judgment there was no delivery of this kind. Even assuming that although the estate was under attachment, a sufficient seisin in it remained to the donor which he could impart to the donee, still it appears by the evidence of Mr. *Perry*, which is treated as trustworthy on both sides, that in point of fact Rajah *Deedar Hossein* remained in receipt of the rents and profits of the property until his death. Therefore if the deed were a mere deed of gift there was not that delivery of possession which was necessary to give it effect by Mahomedan law. A question which was touched upon, though not much argued, viz., whether the doctrine of Mahomedan law relating to "confusion of gifts" applied, appears not to arise, as there was no delivery of possession.

But it was contended that this was a deed of gift for a consideration, and therefore that the delivery of possession was not necessary. It was, however, conceded that in order to make the deed valid in this view of the case, two conditions at all events must concur, viz., an actual payment of the consideration on the part of the donee, and a *bond fide* intention on the part of the donor to divest himself *in presenti* of the property, and to confer it upon the donee. Undoubtedly, the adequacy of the consideration is not the question. A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given. Some of the cases have gone so far as to say that even a gift of a ring may be a sufficient consideration; but whatever its amount, it must be actually and *bond fide* paid.

Upon the subject of consideration there is the evidence of Mr. *Perry*.

man was present at the time of the execution of the document, who says that the Rajah admitted that at some previous time he had received the consideration. There is the evidence of *Enayut Hossein* himself, who speaks to having paid the consideration, although he does not condescend to any particulars; and there is the evidence of one or two other witnesses, who speak of the consideration being given at the time of the execution, which appears scarcely reconcilable with the evidence of *Mr. Perry*. But the whole transaction must be looked to. *Mr. Perry* speaks, as far as his knowledge is concerned, of the deed remaining in the possession of Rajah *Deedar Hossein*, although no doubt there is some evidence to the opposite effect. But it is certain that no proceeding was taken for obtaining mutation of names for more than twelve months after the execution of the deed. A petition was presented on the 16th of March, 1841, purporting to be on the part of the Rajah, and requesting a mutation of names, and there was another by *Enayut* on the 3rd of May of that year. But, on the 19th of June of that year, the Rajah *Deedar* presented a petition altogether repudiating the transaction, declaring that he had received no consideration money whatever, that it was not intended that any transfer should take place until after his death, and praying that the mutation of names should not be effected. On being questioned what his real wishes were, he still persisted in declaring his wish that *Enayut* should not be substituted for him in the books of the Collectorate. It is true that on the 19th of November, 1841, a petition was laid before the Collector, purporting to come from *Deedar Hossein*, in which he set up the transaction, declaring that he had received the consideration money, and desiring that the name of his son should be entered, but that was several days after he was dead. He died on the 15th. The petition was dated on the 14th, received on the 19th, and the Collector very properly declined to act upon it. No evidence was given as to the state of the Rajah when he executed this petition, so shortly before his death (if indeed he did execute it), although Rajah *Enayut Hossein* and *Heera Lall*, the mokhtar who was concerned in it, either of whom could probably have given information on the subject, were not examined as witnesses in the cause.

Taking into consideration all these circumstances, their Lordships have come to the conclusion that the transaction set up on behalf of the Defendants was not a real one, that no real consideration passed, that there was no intention on the part of the Rajah to part with the pro-

perty at once to his son, but that both father and son were endeavouring to evade the Mahomedan law, by representing that to be a present transfer of property which was intended only to operate after the father's death. Their Lordships therefore agree with the High Court in their view of the effect of the deed.

The next question arises as to the will. It was found as a fact by Mr. *Lock* that the heirs had not consented to this will; and with that finding their Lordships are satisfied. But it was argued by Mr. *Cowie*, first, that the will did not require confirmation; secondly, that at all events so much of it as gave one-third to *Enayut Hossein* for pious uses was not in contravention of Mahomedan law, and was therefore valid without confirmation. The effect of the will is, in the first place, to declare *Enayut Hossein* the executor and representative of *Deedar*, and to direct him to look after the zemindary, and so forth. Then follows this passage: "I divide the remaining two-thirds now under my possession, uninterfered and unconcerned by any one else, into three portions. One portion to be laid out as the executor may think proper for the testator's welfare hereafter, by charity and pilgrimage, and keep up the family usage, namely, the expenses of the mosque and tazeedaree of the sacred martyrs, and for the comfort of the travellers, the surplus amount to be appropriated by himself, the executor." Then it goes on to say, from the other two-thirds "he shall keep every one by his good conduct and affection contented and satisfied. It is also necessary for all persons having rights, heirs, and friends connected with me to obey the said executor and consider him my representative." Then further: "None of the heirs have power to sell or divide the landed property mentioned in the will." This will, in its general scope, appears to their Lordships to be in contravention of Mahomedan law. With respect to the limited contention, that it may be supported with respect to the devise of the one-third share, it appears further to their Lordships that that devise, considering the vague character of it, and that the beneficial interest is left to *Enayut Hossein* after he has devoted what he may deem sufficient to certain indefinite pious uses, is in reality an attempt to give, under colour of a religious bequest, an interest in one-third to *Enayut Hossein*, in contravention of Mahomedan law.

The survivorship between *Edoo* and *Nuzeerodeen* is a question made by no means clear on either side. Mr. *Muspratt* appears to have decided it almost, if not entirely, upon the ground that *Enayut Hossein*

put in certain proceedings in *forma pauperis*, the petition to sue and other documents, purporting to have been executed by *Edoo* in 1845. If he did then execute them, undoubtedly he had survived his brother, who died in January or February, 1844. There appears to have been oral evidence on both sides; on the one side, that *Edoo* lived until 1845, on the other, that he died some time in 1843, a few months before his brother. The judgment of the High Court appears to be in effect that after a very careful consideration of these documents, after directing various searches for the originals, of which attested copies were produced, which searches proved fruitless, they have come to the conclusion that these documents are not genuine. Their Lordships do not feel that sufficient is laid before them to satisfy them that the High Court were wrong in that decision. These documents being rejected as fabricated, the Court say in substance that they credit the testimony of the Plaintiff rather than that of the Defendant, who had shewn himself capable of fabricating documents, and that they do not in this question believe witnesses who on other parts of the case had not been believed.

Under these circumstances, whatever might have been their Lordships' view if the case had come before them as a tribunal of first instance, they do not think that sufficient ground has been shewn for reversing the decision of the High Court.

There remains the question of the right of the Plaintiff to succeed to *Bibee Loodhun*, and that depends upon whether *Bibee Loodhun* was merely a concubine or a wife. It is an undisputed fact that *Nuzeeroodeen*, the son of *Bibee Loodhun*, was treated by his father and by all the members of the family as a legitimate son. It is not that he was on any particular occasions recognised by his father, but that he always appears to have been treated on the same footing as the other legitimate sons. This of itself appears to their Lordships to raise some presumption that his mother was his father's wife. That such a presumption arises under such circumstances appears to have been laid down in a case which has been referred to, *Khajah Hidayut Oollah v. Rai Jan Khanum*,\* in which Dr. *Lushington*, who delivered the judgment of this Board, makes this observation†: "The effect of that appears to be, that where a child has been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection,

\* 5, Moore's Ind. Ap. Ca., 295.

† Page 318.

and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan law, the presumption is in favour of such marriage having taken place." In this case there is no evidence that *Bebee Loodhun* was a woman of bad character, or that her connection was merely casual. She appears to have lived in the house at all events up to the death of the Rajah.

The same doctrine was laid down rather more strongly in a recent case, which came before this Board on the 20th of March, 1873. In the case of *Newab Mulka Jehan Suhba v. Mahomed Ushkurree Khan*, a case from *Oudh*, and a Sheeah case, their Lordship say: "This treatment of the daughter by the Appellants"—that is to say, the treatment of the daughter as a member of the family,—“affords a strong presumption in favour of the right of her mother to inherit from her.” The question there was whether the mother, who was said to be a slave girl, inherited from her daughter, whom she survived, the same question which would have arisen in this case if *Bibee Loodhun* had survived her son *Nuzeeroodeen*. Their Lordships go on to say, after noticing various acts of acknowledgment of the legitimacy of the child: “After these acknowledgments, *Mulka Jehan* and the Appellants who act with her ought in their Lordships’ view to have been prepared with strong and conclusive evidence to rebut the presumption raised by their own acts and conduct; and in the absence of such evidence, they think the presumption must prevail.”

It appears to their Lordships, therefore, that the undoubted acknowledgment by the father and by the whole family of the legitimacy of *Nuzeeroodeen* raises some presumption of the marriage of his mother. But it is said that that presumption is rebutted. The evidence chiefly relied upon for that purpose is the will of the Rajah, in which undoubtedly there is this expression: “For the maintenance of four female servants monthly, 75; annually 900,” and *Bibee Loodhun* does appear to have been one of those female servants there mentioned. At the same time, it is to be observed, this expression occurs only in the schedule; whereas in a part of the will preceding that schedule there is this expression: “The shares of the executor and of the sons, daughters, and wives of the testator and other claimants from the estate fixed annually at,” so and so; and the subsequent provision for the maintenance of every female servant appears to be an expansion of that paragraph in which they are spoken of as wives.

But further, there is the undoubted acknowledgment by *Enayut Hossein* himself of *Bibee Loodhun* being a wife, inasmuch as when *Khy-roonissa* the principal who brings a suit against him, *Enayut Hossein* objects, on the ground that *Bibee Loodhun*, one of the other wives, is not joined

Under these circumstances, it appears to their Lordships that there is evidence not only from the acknowledgment of *Nuzeroodeen's* legitimacy by the family, but from the admission of *Enayut Hossein*, that *Bibee Loodhun* was a wife, and not merely a servant. It is indeed alleged that she was what is called a temporary wife and among the Shiekh sect there appears to be a power of taking a mere temporary wife. But it is to be observed that there is no evidence of her marriage being what is called a temporary marriage, and indeed the witnesses who seek to impugn the marriage on the part of the Defendant speak of *Bibee Loodhun* not as a temporary wife but as a mere servant. The question, therefore seems to be not whether she was a temporary wife in the sense attached to that term in Mahomedan treaties, but whether she was a wife or whether she was a mere servant. On the whole, their Lordships concur with the finding of the High Court. The evidence preponderates that she was a wife and not a mere servant, though no doubt a wife of an inferior order.

A question further arose as to the amount of the share which the Plaintiff would be entitled to, assuming that *Bibee Loodhun* was a wife, and it would certainly seem that her share would only be a fifth of an eighth, that is, a fortieth share, whereas she appears to have received something more by the decree of the Court. But it is to be observed that this in a great measure is a matter of detail, and possibly a clerical error or miscalculation, which might have been set right on an application to the High Court and that in fact the High Court did invite applications for the purpose of remedying errors of this kind.

The result is, that with the exception of the slight variation of amount in the case of the claim of *Mussamut Bibee Loodhun* their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal with costs.

## BOMBAY HIGH COURT.

*The 18th March, 1875.*

PRESENT :

Mr. Justice Kemball and Mr. Justice Nanabhai Haridas.

KRISHNARAV JAHAGIRDAR\* (Plaintiff)

*versus*

GOVIND TRIMBAK (Defendant.)

*Suit by one of two co-sharers to oust a tenant.*

Where a suit was brought by one of two co-sharers to recover land from a tenant, not only in the absence of, but against the express desire of, the other co-sharer :

*Held* that the suit was not maintainable, and that the plaintiff could only sue jointly with his co-sharer, though the plaintiff was sole manager of the joint estate.

KEMBALL, J. :—This is a suit brought by one of two co-sharers in certain *inám* villages to recover possession of two fields, some trees, and a well from an admitted tenant. In the course of the suit, the other co-sharer was made a co-plaintiff, and he filed a statement denying the right of his co-sharer to sue alone, and declaring that the suit was brought without his consent, he being desirous of allowing the defendant to remain in possession so long as he paid the rent. The relationship of landlord and tenant is admitted, so that the only issue for disposal before us in this Regular Appeal is whether the plaintiff is entitled to sue in his own name and person to oust the tenant. It appears that, although the Judge has found that the plaintiff alone manages the village, lets out lands, and takes them back at his pleasure, still that right has never been acquiesced in by the co-sharer Dámodbarráv, and that only three years ago the plaintiff in this case brought his suit against Dámodhar to establish his right to manage when a decree was taken by consent, Exhibit 30, in which it was held that the plaintiff had failed to prove that he was the sole manager, and it was directed that in future he should transact the business with the consent of Dámodbarráv, providing at the same time for any losses that might accrue in the event of the one acting without the assent of the other. Assuming that the Judge is right, in the face of the award above quoted, in holding that the plaintiff did manage the village in question so as to bind his co-sharer by his acts, we think it impossible to hold that he (plaintiff) is empowered by his position to bring a suit, not only in the absence, but against the express wish, of his co-sharer. In support of the

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\* Vide 12, Bom. H. C. Rep., p. 85.



Judge's decree, we have had quoted to us the judgment of this Court to be found at page 141 of the seventh volume of the reports. We do not think, however, that that judgment has any application to the present case, it having been held there that, where a tenant chose to pay a co-sharer other than *the recognized* representative, he was bound at the suit of such representative to pay over again. We need not express any opinion on that ruling, for the question does not arise here. On the other hand, the judgment in S. A. No. 379 of 1873, decided on the 1st April 1874, has been brought to our notice, which exactly meets the present case. In that suit, one of three co-sharers sought to obtain ren' and oust a tenant, and the District Court, in reversing the decree of the Court of first instance, held that the plaintiff, as eldest representative manager, could alone maintain his action, but in Special Appeal, it was ruled that the plaintiff could only sue jointly with his co-sharers, and in that decision we concur. We must, therefore, reverse the decree of the District Judge without prejudice, however, to any right which either of these two co-parceners may hereafter, either by voluntary partition or by a partition made in a suit between themselves only, acquire to proceed severally against the defendant to recover the lands in dispute, and we order that the plaintiff do pay the costs throughout.

### PRIVY COUNCIL.

*The 3rd and 4th November, 1876.*

PRESENT :

Sir James W. Colvile, Sir Barnes Peacock, and Sir Robert P. Collier.

*On Appeal from Allahabad High Court.*

NARAIN SINGH\* and others (Plaintiffs)

*versus*

SHIMBHOO SINGH and others (Defendants).

*Dispossession of second by first Mortgagee—Re-entry of Mortgagor after first Mortgage satisfied—Cause of Action.*

In a suit brought in 1872 by the representatives of a second mortgagee to recover possession of the mortgaged land from the representatives of the mortgagor, it appeared that the second mortgagee had been placed in possession thereof in 1846 by decree of Court, but had in 1847 been dispossessed at the suit of the first mortgagees, upon whose being paid off in 1870 the mortgagor re-entered upon the land :—

\* *Vide* 4, Law Reports, Indian Appeals, p. 15.

*Held* (reversing the decision of the High Court of *Allahabad*), that such entry gave a cause of action to the second mortgagee, and that he was entitled to resume possession of the mortgaged land. The decree of the first Court, which was in favour of the Appellants, was also reversed, so far as it decreed interest upon the mortgage-money during dispossession.

SIR BARNES PEACOCK :—In this case the Plaintiffs, as sons and heirs of *Poohup Singh*, a mortgagee, seek to recover possession of 20 biswals of the zemindary right of mouzah *Lallpoor*. The Defendants in the suit are the representatives of the mortgagor. The Plaintiffs state that they claim to establish their right as mortgagees in virtue of their title as heirs of their defunct father, *Poohup Singh*, “in that, under a mortgage deed, dated *Phagoon Badi*, 7th Sumbut, 1896, *Poohup Singh*, the ancestor of the Plaintiffs, having obtained a decree from the Sudder Ameen’s Court, was put in possession on the 31st of August, 1846.” Most of the Defendants admit the claim, but the Defendants, *Man Singh*, *Shimbhoo Girdharee*, and *Motee* put in an answer, by the second paragraph of which they admitted that under the former decree the Plaintiffs’ ancestor was in possession for upwards of a year; but they set up, in the fourth paragraph of the same written statement, that “the mortgage alleged by the Plaintiffs is wholly unfounded. The Defendants’ ancestor did not receive the mortgage money from the ancestor of the Plaintiffs; and *Poohup Singh*, the ancestor of the Plaintiffs, was a person notorious for his expertness in court affairs. He had, with a view to deprive *Asaram* and *Sheololl* of their mortgage money, obtained by deception a decree on the mortgage deed in suit; and the Defendants’ father had, according to the Shasters, no right to transfer and waste the Defendants’ ancestral property, without any legal necessity, to satisfy illegal demands. Hence, under the Shasters also, the mortgage alleged by the Plaintiffs is invalid, and the claim is unjust.”

Now, having admitted that the Plaintiffs’ ancestor did obtain possession by virtue of a decree, and that he remained in possession for a year, the Defendants also, in the same written statement, alleged that the mortgage was collusive and a benamee transaction. But although the written statement must be taken altogether, it does not necessarily follow that the whole of the Defendants’ statement is to be taken as proved in their favour, if they offer no evidence whatever in respect of the allegation that the mortgage was a fraudulent transaction.

It appears, then, that the Plaintiffs’ ancestor did get into possession on the 31st of August, 1846. In 1847 he was dispossessed in a suit which was brought against him by the first mortgagees, *Asaram*

and *Sheololl*. He was then turned out of possession, and remained out of possession from 1847 down to the year 1870. The precise terms of the mortgage deed do not appear, but, as far as can be collected, it was a mortgage bond, by which it was stipulated that in the event of the non-payment of the mortgage debt within five years, the mortgagors would cause a mutation of names, and the Plaintiffs to be put into possession.

It appears that the Plaintiffs' ancestor did get possession under that document, and it appears to their Lordships that the decree obtained upon that document gave the Plaintiffs as mortgagees a title to the land as against the Defendants, but it gave them no title as against the prior mortgagees, *Asaram* and *Sheololl*. When *Asaram* and *Sheololl* turned the Plaintiff's ancestor out of possession, it did not destroy his title and right to the land. It may have given him a right of action as against the mortgagors for having mortgaged to him when they had previously mortgaged to *Asaram* and *Sheololl*, but it did not destroy the right which the Plaintiffs obtained against the Defendants by virtue of the mortgage and of the judgment which they had obtained upon it.

The first Court laid down certain issues :—first, whether the original mortgagors executed the mortgage deed in respect of the property in suit on receiving the full mortgage consideration, or whether it was collusively secured without payment of any mortgage consideration, and whether the mortgage deed could take effect against the Defendants according to the Hindu law. The Judge says in his judgment : “ It is apparent that Plaintiffs' predecessor on the former occasion obtained a decree for possession on proving the mortgage deed, and the payment of mortgage consideration ; and the fact of the decree having been made is admitted by the Defendants. Again, all the Defendants, excepting four, two of whom have made no defence, confess the claim, which is further supported by the evidence of *Mouhie Inayut Alli*, pleader, *Choonnee Loll*, putwaree, and two other persons, both named *Hoolasee*, witnesses for Plaintiffs. The plea urged by Defendants must therefore be overruled ; and they have failed to refute the claim.” He therefore gave a decree in favour of the Plaintiffs.

Upon that an appeal was preferred by *Shimbhoo* alone to the High Court ; and one of his grounds of appeal is that there was “ no cause of action and foundation for the Plaintiffs' suit ; neither the deed of mortgage nor the decree has been produced ; the conditions agreed upon be-

tween the parties cannot be ascertained." The High Court, having heard the case argued, gave judgment, and reversed the decision of the first Court. They say that "the High Court's order of the 1st of April, 1872, could not give any legitimate cause of action. Nor did any right of action accrue to the Plaintiffs by reason of the satisfaction of the debt of *Asaram* and *Sheololl*, and the recovery of possession of the estate by the mortgagors or their heirs." It appears to their Lordships that there was a mistake on the part of the High Court in holding that no cause of action accrued to the Plaintiff by reason of the satisfaction of the debt of *Asaram* and *Sheololl*, and the recovery of possession of the estate by the mortgagors or their heirs. It appears to their Lordships that when the first mortgage was paid off in 1870 the title of the Plaintiffs, which had all along been a good title as against the mortgagors, was a valid title as against every one. Then when their title became a valid and a good title the mortgagors had no right to enter upon the possession of their land. But the mortgagors did enter into possession of it, and keep the possession from the Plaintiffs; and it appears to their Lordships, that having the right and title to the land when the first mortgage was paid off, the entry of the mortgagors upon that land to which the Plaintiffs had obtained a right under the second mortgage gave them a cause of action against the mortgagors, the Defendants. The Court proceed: "The right of the Plaintiffs or their forefather to possession was created by the mortgage deed of 1840, and was capable of being legally enforced within a period of twelve years. It was the subject of a former suit and of a decree which was fully executed." So it was; but then that decree gave the Plaintiffs a title. The High Court proceeded: "The dispossession of *Poohup Singh* after the execution of that decree was not an illegal proceeding." It is true it was not an illegal proceeding, because he was dispossessed by persons who had better title; namely, the first mortgagees. The Court go on: "Although he was thereby deprived of the right he had obtained, he had a remedy, of which he might have availed himself, by suing within the proper period for the recovery of the money lent by him to the mortgagors. The present suit is clearly inadmissible, and cannot be decreed even against the confessing Defendants." The High Court held that the Plaintiffs' suit was barred by limitation.

It appears, however, to their Lordships, that the Plaintiffs having a good title when the first mortgagees were paid off in 1870, their cause

of action accrued when the Plaintiffs after that period entered into possession of the estate to which they had no title. It appears, therefore, to their Lordships, that there was an error in the decision of the High Court so far as it regards the question of limitation.

But it is said that there was no sufficient evidence that the decree had been obtained by *Pookup Singh*, the Plaintiffs' ancestor. In the first place, as already stated, the written statement of the Defendants admits that there was that former decree. They say that "under the former decree the Plaintiffs' ancestor was in possession for upwards of a year," and then he was turned out by the first mortgagees. Again, when *Asaram* and *Sheololl*, the first mortgagees, brought an action against the second mortgagee, *Pertab Singh*, the ancestor of the Plaintiffs, and *Lulloo* and others, the zemindars, the mortgagors were also made parties to that suit. And in that suit it appears that the decree of *Pertab Singh* against the zemindars was in evidence. The Sudder Court says: "The Plaintiffs sued *Lulloo* and others, zemindars of the above-named village, for possession on a mortgage bond dated the 18th Kower, 1859 Sumbut; but in consequence of their having omitted to specify the nature of the tenure, they were nonsuited. *Pookup Singh* also sued the zemindars on a mortgage bond, and obtained a decree, which was upheld in appeal." There was a finding then in that case that *Pookup Singh* did sue the zemindars on the mortgage bond, and that he obtained a decree against them. Further, when the first mortgage had been paid off, and the Plaintiffs had been dispossessed by the mortgagors, they attempted to execute a second time the decree which their ancestor had obtained against the mortgagors, and they applied to the Court for an execution of that decree. The Moonsiff decided that they were entitled to have an execution. In that suit, *Shimbhoo*, who is the present Defendant, was one of the parties, and in that case the judgment was produced. The Moonsiff says: "The record of the case having been brought forward, it appears that the objection of the Defendants, judgment debtors," that is, of *Shimbhoo*, one of the present Defendants, "is that *Pookup Singh*, the original decree holder and deceased ancestor of the Plaintiffs, had been put in possession by the Court after the passing of the decree." It appears, therefore, to their Lordships, that there is sufficient evidence in the cause to justify the first Court in coming to the conclusion that the Plaintiffs were mortgagees, and that they obtained possession under a decree founded upon that mortgage.

The judgment of the High Court being erroneous, it becomes necessary to consider whether the decision of the first Court can be maintained to the full extent.

Now the claim made in the plaint is, "to recover possession as mortgagees over the entire 20 biswahs zemindaree right in mouzah *Lallpoor*, pergunnah *Garee*, within the jurisdiction of the *Iglass Tehseelee*, valued at Rs. 5000,"—the valuation is not a matter of importance.—"the principal amount of the mortgage loan, and to recover Rs. 6999 15*a*. 0*p*. interest thereon, during the period of the mortgagee's dispossession, as per detail given below, aggregating Rs. 11,999." Now the Plaintiffs, although they were turned out of the land, might have sued for the interest. All that they are entitled to, as it appears to their Lordships, is to recover possession of the land; and when they have got possession of the land, if the mortgagors apply to redeem, the question will be, how much is due to the Plaintiffs as mortgagees under their mortgage, and how much they are entitled to receive before the mortgagors can redeem. The Judge of the first Court appears to have given them a decree not only for possession of the land, but also for Rs. 6999 interest, in addition to the possession of the land. His judgment is not very clear, but it is necessary to make the point perfectly clear as to what the judgment ought to be. He says: "Claim to recover possession as mortgagees over the entire 20 biswahs zemindaree right in mouzah *Lallpoor*, pergunnah *Garee*, valued at Rs. 5000, principal of the mortgage loan, and Rs. 6999 15*a*. 0*p*. interest on the mortgage amount." Then he says: "Ordered that Plaintiffs' claim be decreed with costs against the Defendants, that the pleaders get their fees." Then he says:—"Subject matter of decree. Recovery of possession as mortgagees, over the entire 20 biswahs right in mouzah *Lallpoor*, pergunnah *Garee*, valued at Rs. 5000, the principal amount of the mortgage loan, and of Rs. 6999 15*a*. 0*p*. interest on the mortgage amount for the period of the Plaintiff's dispossession; total Rs. 11,999 15*a*. 0*p*." If by that decree the lower Court intended to give the Plaintiff a decree not only for recovery of the possession of the land, but also to recover Rs. 6999 in money as interest, it appears to their Lordships that that judgment, so far as giving a decree for the money as interest is concerned, was erroneous.

Their Lordships therefore think that the decision of the High Court ought to be reversed, and that the decision of the first Court should be modified by confining the recovery of the Plaintiffs merely to

the possession of the land. In that case, the Plaintiffs having got possession of the land, the question, as before observed, will remain open until the Defendants seek to redeem the land. Then the question will arise, how much is due to the Plaintiffs as the second mortgagees, and for what amount they are entitled to hold possession of the land under their mortgage.

Their Lordships, therefore, upon the whole, will humbly recommend Her Majesty to reverse the decree of the High Court, and to affirm the decision of the lower Court, so far only as it decrees possession to the Plaintiffs of the land sought to be recovered in the suit. Their Lordships are also of opinion that the Appellants are entitled to the costs of this appeal.

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### HIGH COURT, N. W. P.

*The 20th April, 1876.*

PRESENT :

Sir Robert Stuart, *Kt.*, Chief Justice, and Pearson, Turner, Spankie, and Oldfield, JJ.

HANUMAN PARSHAD\* (Plaintiff) *Appellant*,

*versus*

KAULESAR PANDEY (Defendant) *Respondent*.

*Enhancement of Rent—Act X. of 1859, ss. 3, 4—Act XVIII. of 1873, ss. 5, 6—Rent in Kind.*

A rent in kind (*bhaoli*) which, though it varies yearly in amount with the varying amount of the yearly produce, is fixed as to the proportion it is to bear to such produce, is a fixed rent within the meaning of s. 3 of Act X. of 1859 (corresponding with s. 5 of Act XVIII. of 1873), and the tenant is entitled to claim the presumption of law declared in s. 4 of Act X. of 1859 (corresponding with s. 6 of Act XVIII. of 1873).

Stuart, C. J., Turner, Spankie, and Oldfield, JJ., concurred in the following opinion :—

This suit falls to be decided under Act X. of 1859. By the third section of that Act it was declared that ryots who, in the Provinces therein mentioned, hold lands at fixed rates which have not been changed since the permanent settlement are entitled to receive pottahs at those rates. This provision was introduced to give effect to the design announced by Government, when it established the permanent settlement, that the ryot as well as the zemindar should derive benefit from the boon. There is nothing in the section which limits its operation only

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\* *Vide* I. L. R., 1, All. Series, p. 301.

to ryots who pay rent in cash. Ryots who pay rent in grain may, therefore, claim the privilege, if they can establish that the rates at which they have held their lands are fixed rates. In the case suggested the land is held on the terms that the tenant shall render to the landlord in each year a fixed share of the crop. The quantity of produce delivered may vary in each year, but the rate or share remains the same, be it a fourth or a third or a half, as the case may be. The rate of rent does not vary although its quantum or value may. If then the tenant proves that no alteration in the rate has been made since the permanent settlement, or entitles himself to the benefit of the presumption declared in s. 4 of the Act, he may demand a pottah at these rates as fixed rates.

PEARSON, J. (separately gave a concurring judgment.)

### CALCUTTA HIGH COURT:

*The 21st June, 1877.*

PRESENT :

Mr. Justice Markby and Mr. Justice Prinsep.

THE EMPRESS vs. MARY DONELLY.

*Revival of Prosecution after Discharge—Power of Magistrate to give evidence in a case in which he is the Sole Judge.*

*Held*, that a Magistrate cannot by his own order revive proceedings where no further evidence is procurable which was not before the Court on the first occasion.

*Held*, also, that a Judge who is a sole Judge of law and fact cannot give his own evidence, and then proceed to a decision of the case in which evidence is given.

MARKBY, J.—On the 13th of April a summons was issued by the Magistrate of Howrah for the appearance of the petitioner, Mary Donnelly, on a charge under Section 262, Indian Penal Code, of using a postage stamp which had been previously used. On the 27th, after the examination of three witnesses for the prosecution and one for the defence, the petitioner was discharged, under Section 215, but upon the representation of the Postmaster of Howrah as to the nature of the evidence adduced, the Magistrate on the 30th April issued his warrant to apprehend the petitioner upon the same charge. She was brought up again upon the 4th of May, and the same three witnesses were again examined for the prosecution; another witness was also examined, who had been bound over to appear upon the former occasion, but whom the Magistrate did not then think it necessary to examine. The Ma-



gistrate, on the second occasion, also gave his own evidence on oath upon a merely formal matter. On the 9th May the petitioner was convicted and sentenced to rigorous imprisonment for two months.

The petitioner appealed to the Sessions Judge of Hooghly, who on the 28th of May affirmed the conviction and sentence.

The petitioner then applied to this Court to set aside the conviction as illegal—(1) because the Magistrate had no power to revive the prosecution against the petitioner after she had been discharged, and (2) because the Magistrate could not appear as a witness in a case in which he was the sole Judge. On the argument of the case, it was also contended that there was no evidence which would support a conviction.

As regards the last point, we intimated at the close of the argument for the petitioner, that there was some evidence. Of course we express no opinion whatever as to the sufficiency or otherwise of that evidence; that is a matter into which this Court does not enter upon an application of this kind. Nor is it desirable to comment upon this evidence; but I may say, with reference to an argument used by Mr. Jackson, that in my opinion that evidence does not consist solely of the comparison of handwriting made by the Magistrate.

I proceed now to examine the grounds of law taken in the petition.

With regard to the power of the Magistrate to revive proceedings against an accused person who has been discharged under Section 215, the law provides by that section that a discharge under it is not equivalent to an acquittal, and does not bar the revival of the prosecution for the same offence. By Section 142, also, any Magistrate duly empowered in any case in which he is competent to try or commit for trial, may without any complaint take cognizance of any offence which he suspects to have been committed, and may issue process to compel the suspected persons to appear. These two sections appear, no doubt, to leave the Magistrate, if properly qualified, free to revive any case he likes, whether the discharge be illegal, whether it be improper upon the evidence, whether it appears to the Magistrate that another offence has been committed than that charged, or whether fresh evidence which was not previously forthcoming has come to his knowledge. And the Magistrate could under the sections revive not only any case heard by himself, but any case heard by another Magistrate subordinate to himself; and having revived it, he could under Section 44 send it back to the Magistrate who ordered the discharge for enquiry

or trial. And this is precisely the same where there is a discharge under Section 195 upon an enquiry by a Magistrate with a view to commitment to the Sessions or to the High Court. For all cases of discharge, therefore, the Magistrate would, under the section appear to have the most absolute and uncontrolled power of reviving the proceedings against the accused.

That this, however, was not the intention of the Legislature is obvious from the provisions of Sections 295 and 296. A special proceeding is provided by Section 295 for the case in which an order (which in my opinion includes an order of discharge) is found to be illegal. All that the Magistrate can then do is to report the proceeding for the records of the High Court. So by Section 296, if it appears to the Magistrate that some other offence has been committed than that of which the accused person has been discharged, he may direct the Subordinate Magistrate to enquire into that offence; but this he can only do in a case which, when before that Magistrate, was a Sessions case. If the Magistrate at the same time possessed the unlimited power of reviving proceedings in all cases of discharge and sending them down to his subordinates for further enquiry, which Sections 44, 142, 195 and 215 at first sight appear to give him, these provisions would be wholly meaningless.

It is this difficulty of reconciling the provisions of Sections 295 and 296 with the extensive powers conferred by the earlier sections that seems to me to render it necessary to put some restriction upon the literal meaning of those earlier sections, and taking the whole Act, the only conclusion I can come to is that the Legislature did not intend that the Magistrate should, as a general rule, have any power at all of revision over the proceedings of Subordinate Magistrates in cases of discharge. Section 296 gives that power in one special case only. If a Magistrate, therefore, thinks a discharge illegal or improper, it must be brought before the High Court, in the first case, by a report of the Magistrate under Section 295; in the second case, by an application under Section 297, when the High Court will, if the discharge was improper, order the accused to be tried or committed for trial. On the other hand, if there is any fresh evidence forthcoming, which was not before the Court when the first enquiry was held, then there is no necessity to revive the previous proceedings at all, and the Magistrate can proceed without any reference to the High Court. This seems to me to

be a reasonable construction of the Act, and it is the only way in which I can reconsider all its provisions. That distinction was, I believe, first suggested in a reference by the Officiating Sessions Judge of Sylhet in a case reported in 20, W. R., 46. The learned Judges of this Court do not then say whether they approve of that distinction, but they affirm the order of the Magistrate who had remanded the case for a fresh enquiry upon the ground of there being "further evidence procurable which was not before the Court when order of discharge was given," and not as the Sessions Judge points out on the ground of there being a "failure of justice." But in a subsequent case three Judges of this Court held that a Magistrate could not of his own motion revive a case where the accused had been discharged without examining all the witnesses for the prosecution. I was a party to this judgment, and of course it was not our intention to overrule the decision of the late Chief Justice and Mr. Justice Glover in 20, W. R. We could not do so; and it seems to me that these decisions are reconcilable in the way I have mentioned. I therefore hold that a Magistrate cannot by his own order revive proceedings where no further evidence is procurable which was not before the Court on the first occasion.

The only question, therefore, is whether in this case there was on the second occasion any such further evidence. I think there was not. Indeed, I confess I have great difficulty in understanding what the first evidence is said to be. The petitioner was charged with using a defaced stamp; the envelope of the letter upon which the stamp was, was before the Court on the first occasion, and it is not denied that the stamp was also before the Court on that occasion, but it is said that a certain word, which was at that time written partly upon the stamp and partly upon the letter, was not before the Court as evidence. How that is possible I really cannot understand. I agree with the Sessions Judge entirely that this evidence was before the Magistrate on the first occasion, but its effect had been overlooked.

As to the second point, whether the conviction is illegal because the Magistrate himself gave evidence, that question seems to me to revolve itself into this. Is a sole Judge of law and fact competent to decide a case in which he has himself given evidence?

It has been strongly contended on the part of the Crown that he is so, and that there is no impediment in law to a Judge giving evidence, and then disposing himself of the case by his sole opinion. No instance

of this kind has however been found, and no authority of any Judge or text-writer has been cited in support of such a proposition. The English cases (they are very few and very old) do not go further than to establish that a person having to exercise judicial functions may give evidence in a case pending before him when such evidence can and must be submitted to the independent judgment of other persons, exercising similar judicial functions, sitting with him at the same time (per Norman 4, B. L. R. App. Cr., 187). No case in England is cited in which even under these circumstances a Judge has been called as witness in a trial on which he was sitting later than the trial of Lord Stafford.

Two cases are cited as having occurred in this country—one in the N. A. Rep. for 1857, pt. 2, p. 85, and the other the case before Mr. Justice Norman above referred to. That learned Judge went into the matter on that occasion very fully; and having carefully considered his judgment, I have come to the conclusion that he did not intend to carry the law beyond that which he lays down as the result of the English cases. He is very careful to point out that in the case before the late Nizamut Adawlat, the trial took place with the assistance of a Muhammadan law officer, who might have given a Futwa acquitting the prisoner, and that if he had done so the Judge who gave that evidence could not have convicted him, but could only have referred the matter to the Nizamut Adawlut. Then he says at p. 19 :

“Prior to the enactment of the Code of Criminal Procedure, when a Sessions Judge was trying a case with the assistance of a Muhammadan law officer, it would seem from the case cited and from the analogy of the English cases referred to, that the Judge might have given evidence in a case tried before himself. By the substitution of a system of trial with assessors, a different species of check was introduced. The assessors give their opinions, which the Judge is bound to record. The Judge must transmit an abstract of a trial to the High Court, and on perusal of such abstract the Court may call for the record.”

The learned Judge seems therefore to think that the presence of the assessors brings the case within the rule which he had derived from the English cases. Whether this is quite correct is, I think, open to some question, and it is not quite consistent with what the learned Judge had himself asserted in an earlier part of his judgment. But that appears to me to have been the view at which the learned Judge ultimately arrived.

In the absence therefore of any authority for the position that a sole Judge of law and fact may give evidence, and then decide a case in which he has been a witness, I refuse to give any countenance to what appears to me to be a most objectionable proceeding. Every one admits that it is highly objectionable for a Judge to give evidence even when there are other Judges besides himself. For my own part, I consider these objections so formidable that I would gladly see the practice of calling a Judge as a witness abolished in all cases. But these objections are greatly increased when the Judge who testifies is a sole Judge. The case is entirely in his hand. He has no one to restrain, correct or check him. If he gives evidence upon any matter of importance, the party against whom his evidence tells could not venture to test his credibility either by cross-examination, or contradict it by other testimony. I need say nothing of the indecency of such a proceeding; no one dare venture to defend it. The Judge would therefore give his evidence without the usual safe guards against false testimony—a position which has been over and over again repudiated.

It was contended by Mr. Bell that the appeal to a higher Court was a check upon the Judge. To some extent it may be so, but not a sufficient one. The Appeal Court would deal with the evidence including that of the Judge. But in my opinion the evidence of the Judge being practically incapable of challenge or contradiction ought not to be even taken. Moreover, a Court of Appeal is not a check in the same way that Judges sitting together are a check upon each other. I am therefore of opinion that a Judge who is a sole Judge of law and fact cannot give his own evidence, and then proceed to a decision of the case in which that evidence is given, and that upon this ground, also, the conviction is bad, but as Mr. Justice Prinsep has some doubts about quashing the conviction on this ground, it is better that our judgment should proceed upon the first ground only.

The conviction and sentence are set aside. No application has however been made to us to order further proceedings, and we do not consider it necessary of our own motion to direct any further proceedings against the accused.

PRINSEP, J.—It is unnecessary to repeat the facts connected with the case now before us, as they have been already fully stated.

It is sought to set aside the conviction passed by the Magistrate on three grounds—(1) because the evidence is not sufficient in law; (2)

because the Magistrate, being a witness for the prosecution, is not competent to try it as the sole Judge of law and fact; (3) because, having discharged the accused under Section 215 of the Code of Criminal Procedure, the Magistrate was not competent to review the proceedings and try the accused.

On the first point, I entirely agree with my learned colleague that there is evidence which, if believed, is sufficient for the conviction of the petitioner. That evidence, as pointed out by Mr. Justice Markby, does not consist solely of a comparison of handwriting, and I am not prepared also to assent to the proposition contended for by Mr. Jackson, that to establish an inference from a comparison of handwriting the evidence of an expert is absolutely necessary. Of course it is most desirable, but to lay this down as an absolute rule would in nearly every case in this country exclude such evidence because experts are not procurable. The powers given to Appellate Revisional Courts are sufficient to correct any misapplication of such evidence.

But before leaving this part of the case, I desire to state emphatically that I express no opinion on the value of that evidence or on the guilt or innocence of the petitioner.

On the second point, I consider that the authorities quoted in the judgment of Mr. Justice Norman, reported at 4 B. L. R. 18, Appellate Criminal Jurisdiction, are conclusive that one who is sitting as a sole Judge is not a competent also to be a witness. No case has been quoted in which this has ever occurred, and the inexpediency of such a rule as well as its possible evil results are too obvious to call for explanation. The case cited by Mr. Bell does not establish this rule, or go further than to state that a Judge is not competent to state in the judgment, or to consider facts which can only come from the mouth of a witness.

But in the present case, I am not inclined to set aside the proceedings on this ground, because it seems to me that Mr. Pellet's evidence was immaterial, and that if it be put out of consideration, there is evidence which, if believed, would be sufficient for the conviction of the petitioner.

On the last point as to the competency of a Magistrate to revive a case after he has passed an order of discharge under Section 215, I find that several decisions of this Court restrict this power to cases in which there may be some fresh evidence forthcoming. Had this point been before us for the first time, I should not be disposed to question a Ma-

gistrate's competency, provided that he is invested with the power described in Section 142; but I do not feel justified in the present case in adhering to that opinion, which is opposed to that of so many Judges of matured experience.

That there is no evidence which can properly be called fresh evidence is to my mind clear. The Magistrate considers that on the definition of evidence and document in the Evidence Act, he is entitled to consider the word "stamped" written across the obliterated stamp to be fresh evidence, because his attention was not directed to it, but I find it impossible to disconnect the word "stamped" from the actual stamp which admittedly was in evidence, or to hold that anything which a Magistrate or Judge may accidentally overlook, and which it is difficult to understand how he could not have seen, can be deemed to be *fresh* evidence when his attention is especially directed to what is practically a part of it. In this case, also, the Magistrate's own statement as a witness leaves it in doubt whether his attention was not drawn by the Postmaster to the word stamped.

Then, the statement of the cook recorded only after the order of discharge, is it as contended fresh evidence? But even if it was not previously recorded, it is clear that the nature of that statement was known to the Magistrate from the Police report on which he discharged the accused. He alludes to that statement in his letter to the Postmaster reporting the result of the case, and he did not think it necessary to examine that witness who had been bound over by the Police to appear before him.

Under these circumstances, I concur in quashing the conviction and proceedings taken subsequent to the order of the Magistrate discharging the accused, holding that under the rulings of this Court the Magistrate was not competent to revive the case, and I further am of opinion that we should not on our motion direct proceedings to be revived.

The order will render it unnecessary to consider the propriety of the sentence passed.

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## CALCUTTA HIGH COURT.

*The 9th, 10th and 14th May, 1877.*

PRESENT :

Mr. Justice Macpherson.

ANDERSON WRIGHT AND Co., *vs.* BEER REINHOLD AND Co.*Extension of time for fulfilling the terms of a Contract—Breach of Contract—Damages.*

Where the defendants were not shewn to have contracted with reference to any sub-contract, or to any intention on the part of the plaintiffs to ship tallow (the subject of contract) to Europe, it was *held* that, in the absence of notice of such an intention, there was nothing in the nature of the article which necessarily made it known to the defendants that it was being bought for export ; *held* also, that the plaintiffs are not entitled to recover by way of damages what they might have made by shipment, or what they have lost by reason of having been unable to perform sub-contracts, and that they must fall black on the ordinary rule, and take the difference of price between the contract rate and the market rate at the time of the breach.

Messrs. J. D. Bell and T. A. Apcar, instructed by Messrs. Sander-son and Co., for the plaintiffs.

Messrs. Jackson and Stokoe, instructed by Messrs. Chauntrell and and Co., for the defendants.

This was a suit brought by the plaintiffs, a well-known firm of merchants of Calcutta, to recover the sum of Rs. 4,507 damages, which they alleged they had sustained by reason of the defendants having failed to deliver certain tallow which the plaintiffs had bought from them.

The plaintiffs' case was that on the 17th August 1875 they purchased of the defendants, through Messrs. W. Moran and Co., 100 tons of pure refined hard tallow, at Rs. 18 per cwt., delivery to be given and taken at Howrah Railway Station from October 1875 to February 1876, as required by the buyers, who were to give a week's clear notice for despatch. The defendants delivered portions of the tallow during October, November, and December 1875, and January 1876, and the plaintiffs, at their request, extended the time for delivery to the end of March. On the 31st March the defendants had \*only delivered 973 cwts. of tallow, and the plaintiffs on that day wrote to the defendants asking them to telegraph whether they agreed to a claim for Rs. 3,831 as the amount of the plaintiffs' estimated loss of profit on the transaction, or whether the plaintiffs should buy in tallow against them.



On the 24th April the plaintiffs learnt that the defendants refused to admit their claim, and they at once bought in a small quantity of tallow against the defendants, and the sum now claimed was the difference between the price so paid and the contract rate on the balance of the contract.

The defendants admitted the breach of contract, but maintained that the difference between the contract price and the market rate of the day on the 31st March 1876 was only Re. 1, which would make the amount payable by them in respect to the breach Rs. 1,050. The defendants further alleged that on the 12th July 1876 their solicitors, Messrs. Chauntrell and Co. paid the sum of Rs. 1,050 to Mr. Upton, of Messrs. Berners and Co., the plaintiffs' solicitors, in full satisfaction of the plaintiffs' claim, and that it was so accepted by them, though they subsequently, when sending a receipt, treated it as a payment on account.

Messrs. Berners and Co. denied receiving this amount as a payment in full, and alleged that they only received it pending a reference to their principals, who refused to accept it in full satisfaction of their claim; and the correspondence which is usual in such cases, having passed between these two firms, the money was ultimately handed back by Messrs. Berners and Co. to Messrs. Chauntrell and Co., who received it under protest.

The judgment of the Court was as follows :—

MACPHERSON, J.—In this case the contract is admitted; the extension of time for delivery under the contract up to the 31st March 1876, is admitted; and the breach of contract is also admitted. Two questions only remain to be disposed of: first, what damages the defendants became, by reason of the breach, liable to pay to the plaintiffs; and, secondly, what is the effect of the payment which was made to Mr. Upton, as solicitor for the plaintiffs. As regards the damages, there are two points to be decided—that is, as of what date the damages are to be ascertained, and on what principle they are to be ascertained. The date, I think, is the 31st March, on which the breach took place. It is clear that on the 31st March the plaintiffs considered the whole matter at an end, and made a claim for Rs. 3,831 as damages; and, although a certain amount of correspondence took place between the parties from that time onward, up to about the 27th April, the defendants never asked for further time, and they did nothing which, so far as I can see, at all alters the date on

which the damages are to be ascertained. Then comes the question as to the principle on which they are to be ascertained. The plaintiffs first demanded Rs. 3,831, being what they considered to be the profit they would have made if the defendants had fulfilled their contract. The plaintiffs, judging from information received from England, considered that they would on the whole have been better off by Rs. 3,831 if the defendants had completed their deliveries, and all the tallow had been shipped to Europe. But as to any claim for damages founded on the price which the plaintiffs might have got if they had sent these goods to Europe under sub-contracts or otherwise, there is this defect in the plaintiffs' case, that the defendants are not shown to have contracted with reference to any sub-contract, or to any intention on the part of the plaintiffs to ship the tallow to Europe; and in the absence of notice of such an intention, there was nothing in the nature of the article which necessarily made it known to the defendants that it was being bought for export. This being so, it is quite clear from the case of *Williams vs. Reynolds* (6 Best and Smith's Reports 495; 34 L. J. Q. B. 221) and other cases, that the plaintiffs are not entitled to recover by way of damages what they might have made by shipment, or what they have lost by reason of having been unable to perform sub-contracts, and that they must fall back on the ordinary rule, and take the difference of price between the contract rate and the market rate at the time of the breach. The plaintiffs themselves have evidently felt that this is the true measure of damages. They at first claimed for loss of profit, but when the defendants repudiated their liability for any damage save the difference in the market price on the 31st March, they henceforth claimed only the difference in the market price, though disagreeing with the defendants as to the date, the rate of which was to be taken. In the plaint the only damages claimed are calculated solely on the difference in the market value in the end of April or the beginning of May. When, however, we come to consider what the market value was, this difference arises, that the tallow for the delivery of which the defendants had contracted was in fact an article which at the time of the breach was not in the market at all. This is stated in the plaint, and is referred to by the plaintiffs repeatedly in their correspondence. All the evidence shows that there is no market for tallow save during the cold season, which does not extend beyond February, during which season alone it can be prepared successfully; and that on the 31st March the tallow season was

over, and there was none to be had, except a few casks here and there. That a small quantity can be purchased for retail purposes does not constitute a market for the purpose of the present question ; and it is proved that whatever price had been offered, the article was not forthcoming, and the plaintiffs could not have obtained anything approaching to the quantity short delivered by the defendants. The case is in this respect very much like that of *Hinde vs. Liddell* (10 L. R. Q. B. 265) and the other cases there referred to. There was no tallow to be had in the market, and therefore it is impossible to say what the market price really was. I think, therefore, that if the defendants had not tendered to the plaintiffs a sum representing a difference of Re. 1 in market value per cwt., the plaintiffs would have had great difficulty in establishing their right to substantial damages at all. In the case of *Hinde vs. Liddell Ellinger &c. vs. Armstrong* (9 L. R. Q. B.) and *Borries vs. Hutchinson* (34 L. R. C. P.), the defendants had contracted with knowledge of the purpose for which the plaintiffs required the goods ; and therefore, in the absence of any evidence of the market value, it was possible to measure the defendants' liability by the loss of profit, &c. But all these cases differ from the present case in this, that the defendants here are not proved to have had any notice or knowledge that the goods were bought for shipment.

But supposing I could hold that there was any market value for tallow, or any tallow in the market, I should then find as a fact that it is not proved that the rate claimed by the plaintiffs was the true market rate, and that there is at the least as much evidence to show that Rs. 19 was the true rate as there is to support the plaintiffs' claim. Mr. Posner says that Rs. 19 was in his opinion the full market price ; and on the 28th April (when the price was probably higher than it was on the 1st of that month) he did in fact sell a small lot of 10 to 15 casks at Rs. 18, with delivery on or before the 15th May. That sale was not made by Posner with any view to this suit, though it was bought from him with such a view ; and I do not see why I should not take Rs. 19 as a full price on the opinion of Mr. Posner, notwithstanding that Mr. Fornaro considers Rs. 22 to have been the rate at the beginning of April. Mr. Fornaro speaks of no actual transactions (there were in fact none at all, save for an occasional small parcel at retail prices), but says simply that from the information he received from time to time, the price was in his opinion about Rs. 22. Mr. Fornaro says

that he was interested in the subject, having orders to buy, and that the article was not to be had in any quantity, on any terms. So far as there was any market for it, the price of the article was no doubt higher than it had been, for it would naturally rise as the season passed away, and as small quantities only came to be procurable; and the defendants admit that it was higher by one rupee per cwt. As they admit this, and tendered the difference at that rate, I think the plaintiffs are entitled to damages at the rate of Re. 1 per cwt., but to nothing more; in other words, they are entitled only to the sum which was paid by the defendants' solicitors to Mr. Upton. The tender then made was, so far as I can judge, a fair offer on the part of the defendants, and should have been accepted. At any rate, it was a substantial offer, and, before rejecting it, the plaintiffs would have done wisely if they had stopped to consider accurately what their position really was.

As matters stand, the plaintiffs' suit must be dismissed, with costs on scale No. 2. The Rs. 1,050 which were paid to Mr. Upton, and are now in the hands of the defendants' attorneys, will be applied towards payment of their costs.

## CALCUTTA HIGH COURT.

*The 7th May, 1877.*

Mr. Justice Pitt Kennedy.

HARAN CHUNDR A CHATTERJEA,

*vs.*

SRIMATI DOIAMOI DASSI.

*Will—Probate—Party having no interest.*

Where it was sought to obtain probate of a will concerning property stated by the testatrix to be her *stridhan* property, *held*, the factum of the will having been established, that if the property be not *stridhan*, the testatrix's husband's mother (who is not under any circumstances heir to any property which a Hindu widow has power to dispose of) suffers no injustice by the granting of the probate, as the decree does not prejudice any rights she may have.

This was a suit brought to establish the will of one Srimati Durgamoni Dassi, who died at the Medical College Hospital in February 1875 of lock-jaw.

The issues before the Court were—

1. Is the document whereof probate is now sought, the last will and testament of the said Srimati Durgamoni Dassi, deceased?

2. Was the said Srimati Durgamoni Dassi, at the time the said document is alleged to have been executed, of sufficiently sound mind to make a will ?

3. Has the caveator any interest in this suit ?

KENNEDY, J.—Haranchundra Chatterjea seeks to obtain probate of the document propounded as a will. He is resisted by Doiamoi, who sets forward her title as being the heiress of Durgamoni's husband, and who would therefore be entitled to succeed to the property which Durgamoni took by inheritance from her husband.

It seems to me that Doiamoi has no such interest as entitles her to contest the validity of the document.

The Court must still settle the other issues of the case, because it must satisfy itself as to the factum. But it weighs on the consideration of the Court that no person entitled contests the validity of the document.

It is quite clear a husband's mother is not under any circumstances heir to any property which a Hindu widow has power to dispose of. The property of Durgamoni derived from her husband goes to the heir of her husband, whether she died testate or not.

\* \* \* \* \* I feel bound to pronounce in favor of the will. The case was one which required investigation.

If the impugnant had any interest in the suit, I should feel bound to give her costs out of the estate, but she had none.

Costs have been incurred by concurrent mistake of both parties in allowing the case to come so far ; therefore the impugnant is not to be responsible for costs of the other side.

Each party must bear their own costs.

The impugnant suffers no injustice if the property is not *stridhan* property, and this decree does not prejudice any rights she may have.

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## CALCUTTA HIGH COURT.

*The 14th and 21st June, 1877.*

## PRESENT :

Mr. Justice Markby and Mr. Justice Prinsep.

THE QUEEN on the prosecution of JADOO NATH GHOSE and others,

*versus*

BROJO NATH DEY.

*Municipal Act (Act III. B. C. of 1864)—Nullity of order made by Municipal Commissioners to stop up a road.*

No power to stop up or divert public highways is any where in express terms given by Act III. (B. C.) of 1864, to the Municipal Commissioners. The only powers which Municipal Commissioners have over them is to make, repair and keep properly cleasured the highways, and to do such things upon them as are necessary for conservancy. Any order passed by the Vice-Chairman of a Municipality to close up a road must be considered to be a nullity.

Babu Troilokynath Mittra for the appellants Jadoo Nath Ghose and others.

Babu Tarak Nath Dutt for the respondent Brojo Nath Dey.

This was an appeal from an order passed by Mr. A. H. Haggard, Joint Magistrate of Serampore, under Section 521 of the Code of Criminal Procedure ; and the facts of the case were as follows :—

One Brojonath Dey, a wealthy zemindar of Serampore, possessed a piece of land on the banks of the river at Mahesh in Serampore, and across the middle of this land there was a foot-path to the river, which the people of the adjacent neighbourhood used for the purpose of going to and from the river.

In the beginning of the year 1869, the Babu erected two turnstiles across this foot-path, which had the effect of obstructing the way.

The people in the vicinity having preferred a complaint, the then Magistrate of Serampore, Mr. J. A. Hopkins, having taken evidence and personally satisfied himself that the obstruction existed, found the zemindar's servant, under Section 253 of the Indian Penal Code, guilty of the offence of obstructing a public road, and sentenced him to pay a fine of Rs. 2, and ordered the zemindar to remove the obstruction within 24 hours.

Upon this the zemindar appears to have brought some kind of a suit in the Munsiff's Court of Serampore, which was dismissed by him

and by the Subordinate Judge on appeal; and this latter judgment was upheld by the High Court in Special Appeal (Kemp and Paul, J.J.), the learned Judges in their judgment making the following observations: "Looking to the frame of the plaint, it is clear that the main object of this suit was to have the plaintiffs' title confirmed over the disputed road, on the allegation that the road which had been pronounced by the Magistrate to be a public thoroughfare was in reality the private property of the plaintiffs \* \* \* but it is very clear that the plaintiff intentionally brought his action in the Civil Court in order to raise again the question already disposed of by the Magistrate, and concerning which the Civil Court had no jurisdiction."

Disappointed in the Civil Court, the zemindar appears to have waited patiently for the transfer of Mr. Hopkins, and on this taking place, he, in August 1874, petitioned the Municipal Commissioners of Serampore to be allowed to close the road by their giving up their claim to the same, and the Vice-Chairman of the Municipality, Mr. J. E. B. Jeffery, thereupon recorded the following order:—"Application granted on condition that the applicant make at his own expense a road 10 feet wide, *round the south and west side of his garden*, so as to form a through communication between Distillery and Napitpara Lane.

J. E. B. JEFFERY,  
31st Dec. 1874."

Although this order was dated the 31st December 1874, the zemindar made no attempt to close this road until the beginning of 1876, when he erected fences to bar the ingress and egress of the public.

Upon this the inhabitants of the neighbourhood presented through the local Commissioners a petition to the Municipal Commissioners of Serampore, complaining of the aforesaid alleged illegal and unjust order, and praying for redress, but the majority of the Commissioners in meeting assembled declined to interfere with the Vice-Chairman's order, under the impression that they had no power to do so.

The matter was then brought to the notice of the Magistrate of Hooghly, Sir William Herschel, who, under Act III. B. C. of 1864, also Chairman of the Serampore Municipality, and he, on the 2nd May 1876, in calling for a report from the Vice-Chairman, characterized the order of Mr. Jeffery as a bad order, as it gave a way for no consideration, and the order of the Municipality as bad, because it affirmed for

no other reason than that the thing was done, an illegal order of their Vice-Chairman.

Correspondence ensued, and subsequently the case was taken up under Section 521 of the Code of Criminal Procedure, by the present Joint Magistrate of Serampore, Mr. A. H. Haggard, who is also *ex-officio* Chairman of the Municipality, and the following is his judgment in the matter which formed the subject of the present appeal:—

“ After taking evidence in this case, I cannot come to the conclusion that the obstruction made by Brojo Nath Dey was an unlawful one. I do not think that the Municipality, in permitting the closing of the road to Satgopepara Lane were acting *ultra vires*, or that the amount of inconvenience caused to the public by its order was so great as to render the act of the Municipality illegal, and by consequence, that of Brojo Nath Dey illegal. The *detour* that has to be made by persons going to the river does indeed appear to be very large. But measurement shows that it is not so large as I had thought, the *detour* varies in distance for each person's house. It appears that Ram Kumar Ghose, the person who was most excited on the subject, has actually only a *detour* of 17 feet to go, if he uses the back door of his house.

Brojo Nath made a fair offer to the Municipality of offering to make another road if he was allowed to stop this one. His offer was accepted, and he has fulfilled his part of the contract. I admit that I think he has got the best of the bargain, as he makes his garden a fine and valuable property at a cost of a few hundred rupees.

I think that the Serampore Municipality sold their birthright for a mess of pottage—for such a gift as they gave Brojo Nath Dey, they ought to have exacted an adequate price. But they failed to do so, and I cannot now interfere in the matter, unless their act was illegal, which I cannot hold it to have been. On the evidence, therefore, I cannot make my order of the 21st October absolute, and I hereby cancel it.

A. H. HAGGARD,

21st Dec. 1876.

Since the institution of this case *without complaint* certain petitions have been presented, praying me to open the road. The petitioners' mooktar should be informed of my order if they think either my order illegal or that of the Municipality, they should have resort to the High



Court, in its *Original Jurisdiction*, to set aside the order of the Serampore Municipality.

A. H. HAGGARD,

21st Dec. 1876.

Upon the case coming on for hearing in the High Court, it was ordered that notice be given to the Commissioners of the Serampore Municipality, in order that they might appear if they thought fit, and June 14th was fixed for the final disposal of the case.

On the case coming on for final disposal on the 14th June, the Junior Government Pleader stated that he had received a letter from the Chairman of the Serampore Municipality, in which he intimated that the Commissioners had decided not to appear.

Baboo Troilokynath Mittra observed that the present Vice-Chairman of the Municipality was sitting beside him, and that he believed he might safely state that a number of the Municipal Commissioners were strongly in favour of the road being opened.

The learned Pleader then placed before the Court the facts of the case as detailed above, and argued that the Vice-Chairman of the Municipality had no authority to close a road, and that therefore his order was *ultra vires*, and consequently illegal, and the closing of the road under these circumstances, by the Baboo, would of necessity therefore be illegal, and the obstruction an unlawful one within the meaning of Section 521 of the Criminal Procedure Code.

He then proceeded to read Sections 2, 10, 11, 13, 15, 16, 57 and 58 of the District Municipal Improvement Act of 1864, and pointed out that no power was given to the Commissioners to sell, divert, or close a road; it was true that Section 13 gave power to sell land not required for the purposes of the Act, but in the first place he would contend that the word land did not include a highway, and in the second place, that the sale of a road would not be for the purposes of the Act, which were expressly the repair and maintenance of roads.

The Court would observe that, though leave was expressly reserved to the Commissioners to grant permission, under Section 58 of the Act, to persons to make alterations in the fences, pavements or posts of a highway, Section 57 made the obstruction of a public highway an offence punishable with a fine of Rs. 100, and the Commissioners had no power reserved to them to sanction it.

The learned Pleader then drew attention to the Calcutta Municipal Act of 1863, and pointed out that Section 109 of that Act vesting the streets in the Justices, was precisely similar to Section 10 of the District Municipal Act vesting the Highways in the Commissioners; Section 110 of the Calcutta Act gave the Justices express power to divert and close up streets, and it must therefore be assumed that the Legislature considered that without that section the Justices had no such power. The District Municipal Act was passed after the Calcutta Act, and though Section 109 was repeated in the District Act, Section 110 was entirely, and no doubt designedly, omitted; it would therefore clearly seem to have been the intention of the Legislature that the Mofussil Municipal Commissioners should have no such power.

It might not now be out of place to refer to the English Acts on the subject of Highways. The principal Act was 5 and 6, Will. 4, c. 50; and Section 84 of that Act laid down a most stringent procedure to be adopted in case it was wished to divert or stop a road, the inhabitants in vestry assembled had first to consider whether it was expedient to close the way, two Justices had then to view the same, and if it appeared to them that the road might be diverted or turned, so as to make it *nearer or more commodious to the public*, the said Justices were to affix notices at the place and by the side of each end of the highway, and were also to insert the same in the newspapers for four successive weeks, and also to affix them on the door of the church for the same period; and there was a right of appeal reserved to the inhabitants affected.

The Court would observe that even there the road could only be diverted if it were *nearer or more commodious* to the public, but it was generally admitted in the present case that the stoppage of this road was *a positive inconvenience*.

At the common law of England, there can be no destruction of the public right; a highway must always continue to be a highway. The case of *Fowler vs. Sanders*, Cro. Jac. 446, fully proves that it cannot be narrowed, neither can it be enclosed. The people have no ability to consent to a relinquishment of any of their rights except by the agency of their representatives in Parliament.

The Statute 13, Geo. 3, c. 78, gave power to the Justices to widen and divert roads; this statute was amended by 55 Geo. 3, c. 68, which required public notice to be given, and gave a right of appeal; but the manner in which this power was exercised was often the subject of com-

plaint. See *Wellbeloved on Highways*, p. 371, and preface IX.; *Rex vs. Justices of Worcestershire*, 2 B. and Ald. 228; *Rex vs. Justices of Surrey* of D. and R., 857; *Rex vs. Homer*, 2 B. and Ald., 150.

It was doubted, before the passing of the Act of Will. IV., whether Justices could divert a road *partially*, so as to vary the line of road for carriages, but continue it for passengers. *Rex vs. Winter*, 8 B. and C., 785; 3 Man and R.

In *Reg. vs. United Kingdom Electric Telegraph Co.*, 9 Cox, Cr. Ca., 137, Martin B., held among other things that a permanent obstruction erected on a highway, and placed there without lawful authority, which renders the way less commodious than before to the public, is unlawful. So in *Reg. vs. Train*, 9 Cox Cr. Ca., 181, it was held that the withdrawal of a part of the public highway from the use of the public is a nuisance, and that the vestry had no power to grant such power. See Kincaly's Penal Code, and the notes to Section 431, page 254.

Turning again to the Calcutta Act of 1863, it had been held that under the 180th Section, the Justices of the Peace are required to keep up and maintain the existing tanks, reservoirs, &c., vested in them, or to substitute a new tank, reservoir, &c., for any existing tank, reservoir, &c.; *i. e.*, new works of a like kind, each for each, in place of the old. Therefore, when the Justices had closed a tank for the purpose of constructing in its place a different means of water-supply, a mandamus was issued by the High Court, directing the Justices to maintain the tank, and supply it with water, or to substitute another in its place, and supply that with water—(*Reg. vs. the Justices of Calcutta*, 2 Indian Jurist, N. S., 182)—Sections 12 and 15 of the District Municipal Act 1864 enacted that the Commissioners shall thenceforth repair and keep up the roads, streets, and drains, but no power of substitution was given.

He would therefore contend that the order of the Vice-Chairman, Mr. Jeffery, was bad in law, being unauthorized and illegal; that it had never been confirmed and ratified by the Commissioners at a meeting, and that even if it had, it was bad, because neither the Commissioners nor their Chairman had any authority to close, stop, or divert any public highway.

He might in conclusion mention that in the Mofussil Municipalities Act of 1876 a power was expressly reserved, in Section 213, to the Commissioners to close *temporarily* any road or part of a road for the purpose of repairs or for any public purpose. He would therefore argue

that the Legislature considered it necessary to give the power of closing roads *temporarily* by express enactment, and it would therefore seem that they considered that the Municipality would have no power to close a road even temporarily, unless it was expressly so enacted.

The learned Pleader then drew the Court's attention to Sections 189 and 190 of the Calcutta Municipal Act of 1876. It would be observed that Section 189 of this Act was almost identical with Section 32 of the Mofussil Act of 1876 but Section 190, which gave the Justices power, among other things, to turn, divert, discontinue or stop up any public street, was altogether omitted from the Mofussil Act, in the same manner as Section 110 of the old Calcutta Act had been omitted, as previously pointed out, from the District Improvement Act of 1864. There could therefore be no doubt that it had all along been the intention of the Legislature to limit the powers of the Mofussil Municipalities, and where we found such express provisions inserted in the Calcutta Act, we could not safely assume that the Mofussil Municipality had them by implication.

Babu Taraknath Dutt, on the other side, rested his argument entirely on Section 10, and contended that as the roads vested in the Commissioners, they had the power to sell them. He quoted no authorities in support of his argument.

Babu Troilokynath Mitter, in reply, said it was no doubt true that the road vested in the Commissioners, but Section 12 made them trustees for the purposes of the Act, and the purposes of the Act were expressly stated to be, among other things, the repair, keeping up and maintenance of the roads.

The Court took time to consider its judgment.

The following was the judgment of the Court :—

MARKBY, J.—The only facts in this case which appear to me to be of importance for the purpose of the present application are these :—

Within the town of Serampore there is a body of Municipal Commissioners appointed under Act III., B. C. of 1864. Within the limits subject to their jurisdiction, there was formerly a lane, called the Shudgoprah Lane, leading to the River Hooghly. This lane ran through the garden of Babu Brojonath Dey. In the year 1869 this lane was stopped up by persons acting on behalf of the Babu. These persons were convicted under the Indian Penal Code of obstructing a public highway. Proceedings were then taken in the Civil Court by the Babu with the

view of establishing that the road was not a public highway, but these proceedings were unsuccessful, and it is now admitted that the lane in question was a public highway. The litigation in the Civil Courts ended in January 1871. In August 1874 Babu Brojonath Dey presented a petition to the Municipal Commissioners of Serampore, which still contests the fact that the lane is a public highway, but nevertheless prays for permission to close it under such conditions as the Municipal Commissioners may consider reasonable. There is nothing to shew what proceedings by way of enquiry were made upon this application, but on the back of the petition there is written this order.

“ Application granted on condition that the applicant make at his own expense a road 10 feet wide round the south and west side of his garden, so as to form a thorough communication between Distillery and Napitparah Lane.” This order is signed.

(Sd.) J. E. B. JEFFERY,

31st Dec. 1874.

There is some doubt whether or no Mr. Jeffery added any word to shew the capacity in which he signed the order, but it is admitted that he was the Vice-Chairman of the Municipality, and it has been assumed in the present argument that this order was made by him in that capacity. It is not clearly shewn when this order was acted on, but the road was completely stopped at some time prior to January, 1876. The road to the south and west of the Babu's garden was also made as directed, but it would appear that there is some doubt whether this was really a new road, or whether it existed before and was only widened.

An attempt was then made by the inhabitants of the neighbourhood to induce the Municipal Commissioners to reconsider the order of Mr. Jeffery, but the Municipal Commissioners thought they were not competent to do so. This application was then made to the Magistrate of the district, who is ex-officio Chairman of the Municipality. The District Magistrate appears to have satisfied himself that the order of Mr. Jeffery was injurious to the inhabitants, and that it was made without consulting any of the other Commissioners, but nevertheless he ultimately thought he had no power to interfere. The matter was then taken up by the Joint Magistrate of Serampore, who in October 1876 called upon Babu Brojonath Dey, under Section 521 of the Code of Criminal Procedure, to shew cause why the obstruction to the Shudgoparah Lane

should not be removed. The Joint Magistrate, however, also ultimately held that the order of Mr. Jeffery was not illegal, and he refused to proceed any further.

This last order is now before us under Section 297 of the Code of Criminal Procedure, and the question of law raised is whether the Joint-Magistrate was right in holding the order of Mr. Jeffery to be legal.

The question turns on the construction of Act III. (B. C.) of 1864, which was in force when the order of Mr. Jeffery was made. The powers and duties of the Municipal Commissioners are defined in Sections 6 to 23. No power to stop up or divert public highways is anywhere in express terms given by the Act, but public highways not being the property of Government or private property, are by Section 10 vested in the Municipal Commissioners. By Section 9 the Municipal Commissioners are enabled to sue and be sued in their corporate name, to hold properties, movable and immovable, and to convey the same, and to enter into all necessary contracts for the purposes of the Act. By Section 12, the Municipal Commissioners are required to apply all property vested in them for the purposes of the Act.

The argument is that Shadgoparah Lane was a public highway vested in the Municipal Commissioners, and that, under the Act, the Municipal Commissioners may dispose of their property in any way they please, provided they do so for the purposes of the Act, which purposes, it is further said, are defined in the preamble, namely, the "conservancy, improvement and watching" the district where they have jurisdiction. The Commissioners, therefore, it is argued had a right to stop up this road, if their doing so was for the improvement of the town, of which they are the sole Judges. I am of opinion, however, that it was not the intention of the Legislature to give by implication these very wide powers to the Municipal Commissioners. I read the provisions of those sections of the Act which define the powers and duties of the Commissioners quite differently. I think the general words of Sections 9, 10 and 12 are controlled by the specific provisions of Sections 13, 14, 15 and 16. In regard to highways, which are the property of the Municipal Commissioners, I think that the only powers which Municipal Commissioners have over them is to make, repair and keep properly cleansed such highways, and to do such things upon them as are necessary for conservancy (Section 15). If any more extensive works are necessary, then the consent of the Lieutenant-Governor must be taken (Section

16; and even with the consent of the Lieutenant-Governor there is no power to stop up a road. It seems to me that if the mere fact of property being vested in the Municipal Commissioners for the purposes of the Act gave them the extensive powers contended for, those sections which define the powers of the Municipal Commissioners over their property would be meaningless.

This construction of the Act appears to me to be most in accordance with what is reasonable and proper. By Section 20, the Chairman or Vice-Chairman may make any order authorised by the Act unless it be expressly required to be made at a public meeting, and therefore, if by the Act the Municipal Commissioners are authorized to make an order for the stopping up of a public highway, it would be very difficult to say that that order might not be made by the Chairman or Vice-Chairman acting alone, and the order in the present case was in fact made by the Vice-Chairman upon his sole responsibility. It is most improbable that the Legislature intended to confer such extraordinary powers upon a single individual.

The construction which I have put upon Act III. (B.C.) of 1864 is further confirmed by a comparison of its provisions with those of Act VI. (B.C.) of 1863, relating to the town of Calcutta, upon which the Act of 1864 was obviously modelled; Section 109 of Act VI. of 1863 vests the streets of Calcutta in the Justices almost in the same words as Section 10 of Act III. of 1864 vests public highways in the Municipal Commissioners. But by Section 110 of the former Act express power is given to the Justices with the sanction of the Bengal Government, "to turn, direct, discontinue or stop up any public street." This, I think, shews that merely vesting highways in a Municipality does not *ipso facto* empower the Municipal body to stop them up, if they happen to consider that to do so is advantageous for the town. I may also observe that to hold that the Municipal Commissioners derive a power to stop up highways from the circumstance that certain highways of the town are vested in them would lead to this, that highways not vested in them could not be stopped up. This distinction would be reasonable enough as regards highways vested in Government, but quite unreasonable as regards highways which are the property of private individuals.

I therefore consider that this order of Mr. Jeffery permitting Babu Brojonath Dey, upon certain conditions, to stop up this lane was an order which neither he as Vice-Chairman, nor the Municipal Commissioners,

had power to make, and that the order of the Joint Magistrate of 21st December 1876 holding Mr. Jeffery's order to be legal was wrong in law, and ought to be set aside. The record of the proceedings against Brojonath Dey, under Section 521, will be returned to the Joint Magistrate, and he will finally dispose of those proceedings by such order as he thinks proper, treating Mr. Jeffery's order for the purpose of these proceedings as a nullity.

I am very glad to have arrived at a result which will probably have the effect of restoring to the inhabitants of the neighbourhood the use of the road of which they appear to me to have been very improperly deprived. I quite agree with the condemnation passed by the Magistrate and present Joint Magistrate upon Mr. Jeffery's order, by which the interests of the public seem to have been sacrificed to those of a single individual.

PRINSEP, J., concurred.

### PRIVY COUNCIL.

*The 12th June, 1877.*

#### PRESENT :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith and Sir Robert P. Collier.

(On Appeal from Judicial Commissioner's Court, Central Provinces.)

RAJAH PARICHAT (Defendant) *Appellant*,

*versus*

ZALIM SINGH (Plaintiff) *Respondent*.

*Special Appeal—Maintenance—Illegitimate son—Assignment of land—Mitakshara—Son unborn at the time of the Assignment.*

Where the plaintiff sued for possession of an estate but the lower courts instead of awarding him possession made a decree in his favor for receiving maintenance out of the estate and he acquiesced in that decree, and subsequently in special appeal by the defendant the decrees of the lower courts were reversed by the Judicial Commissioner and a decree for possession granted to plaintiff, *held* that the Judicial Commissioner was competent to make such a decree.

It appearing to their Lordships of the Judicial Committee of the Privy Council to be unquestionably the law, that the illegitimate son of a person belonging to one of the twice-born classes has a right of maintenance, it was *held* that in assigning maintenance to his illegitimate son, his father was acting in the performance of a legal obligation, and that a grant of property made by him out of his ancestral estate for the maintenance of his illegitimate son is not invalid.

The following is a statement of the facts connected with this case :—  
The late Rajah Bahadoor Singh, while he had no legitimate son born,



granted to the plaintiff his illegitimate son, a portion of his ancestral property, for his maintenance. The Rajah subsequently had his legitimate son, the defendant born. After the death of the Rajah, the plaintiff was dispossessed and he sued for possession of the estate granted to him by the Rajah. The lower Courts instead of awarding him possession made a decree in his favor for receiving the net profits of the estate after deducting the expenses of its management. On special appeal by the defendant, the Judicial Commissioner reversed the decrees of the lower Courts and made a decree granting possession of the estate sued for, to the plaintiff. The defendant having appealed to the Privy Council against that judgment, their Lordships of the Judicial Committee, after reciting the above facts delivered the following :—

JUDGMENT.—It has been argued, that to make this decree upon a special appeal was *extra vires* of the Judicial Commissioner, the Courts below having decided against the Plaintiff's claim to possession, and he having acquiesced in their decisions. It seems, however, to their Lordships, that the Appellant himself re-opened that question. He took the cause before the Judicial Commissioner. By his fifth ground of appeal he contended that the particular decree which had been made was improperly made; by his first ground of appeal he contended that the suit ought to have been dismissed. If he were right on the former point, but wrong upon the latter, it became necessary for the Judicial Commissioner to make some decree, and therefore the question what decree was proper to be made upon the pleadings and evidence in the cause was necessarily open and raised before him.

A more substantial question is that raised by the first ground of appeal. Their Lordships do not think it necessary in this case to determine the question, whether, under the Mitacshara law, a father who has no child born to him is or is not competent to alienate the whole or part of the ancestral estate; whether the rights of unborn children are so preserved by the Mitacshara as to render such an alienation unlawful. When that question does come distinctly before them, it will of course be their duty to decide it; but upon the present appeal they abstain from laying down any positive rule one way or the other. It seems to them that the objection in this case goes only to the particular alienation by the sunnud, which stands upon a different footing. It appears to be unquestionably the law, that the illegitimate son of a person belonging to one of the twice-born classes, and the Rajah may be assumed to fall

within that category, has a right of maintenance. Therefore, in assigning maintenance to Zalim Singh, his father was acting in the performance of a legal obligation. He could not consult his legitimate son, because at that time there was no legitimate son born, and therefore looking to the purpose for which the grant made by the sunnud, whatever may be its extent, was made, their Lordships think that it would not fall within the prohibition, supposing, which they are far from deciding, that a father, having no legitimate son, is by the Mitacshara law incompetent to alienate ancestral estate to a stranger. Their Lordships therefore, without, as has been said before, determining anything as to the extent of the grant, are of opinion that upon the question whether the Rajah Bahadoor had power to make it, the concurrent decisions of the three Courts in India were correct; and on the whole case they are of opinion that the decree of the Judicial Commissioner is right, and ought to be affirmed; and they will humbly advise Her Majesty to affirm it, and to dismiss this appeal. There will be no costs, as the Respondent has not appeared.

### DIFFERENT KINDS OF MORTGAGES.\*

In the present course of lectures I shall adhere to the classification of securities which we found in the Roman law. Following that classification, I propose in this lecture to make a few general observations upon the various kinds of conventional mortgages in use in India at the present day. From what I have already said, you must have seen that a creditor possessing a security may have either a right to sell the property mortgaged to him, or he may become the absolute owner of the property, on default of the mortgagor to repay the money lent to him. In the first case, the creditor is not entitled to anything in excess of the debt and costs. In the second case, the creditor becomes entitled to the property, whatever may be its value. In either case, however, the creditor is wholly independent of the debtor. There is, however, another way in which property may be given as a security; and that is by letting the creditor into possession, and permitting him to repay himself out of the rents and profits. Thus, we have three different kinds of securities all of which are to be found in India. The first is called a simple mort-

\* *Vide* Tagore Law Lectures, 1875-6. Lecture III. by R. B. Ghose, Tagore Law Lecturer.

gage; the second, a conditional sale; and the third, a usufructuary mortgage. It is true they may be sometimes found in combination, which gives rise to a greater variety; but the three I have mentioned are what I may call the primary divisions of Indian mortgages. There are in some parts of India particular descriptions of mortgages peculiar to those provinces, as the *Otti* of Madras and the *Gahun lahen* of Bombay; but they do not possess much general interest, and one of them, the *Gahun lahen*, in its incidents, closely resembles the conditional sale of Bengal and the North-Western Provinces. I shall discuss the various rights and liabilities created by each of these kinds of mortgages in succeeding lectures. In the present lecture I shall state the different ways in which conventional mortgages may be created, and the formalities which it is necessary to observe, ending with a few general observations on this class of securities. Neither the Hindu nor the Mahomedan law requires writing for the validity of any transaction, however solemn. "Contracts of every description, involving both corporal and spiritual consequences, may be made orally." (Per Holloway, J., 2 Mad., 37.) It is true that writing is often enjoined, particularly by Hindu lawyers, and preference, as we have seen, is sometimes given to a transaction evidenced by writing over a parol contract or transfer. But the fact remains that in no instance is writing absolutely necessary by law. Among Englishmen, however, who can only convey by deed, a parol mortgage is invalid at law. We shall, however, presently see that the strict rule of law has been broken in upon by the introduction of a class of securities, known as equitable mortgages, so called because they are only recognised by the Court of Chancery. Among Hindus and Mahomedans, however, a parol mortgage is as good as a mortgage reduced to writing. This rule of Hindu and Mahomedan law has been left untouched by the Legislature, notwithstanding the introduction of a very stringent system of registration. In practice, however, mortgages are almost invariably reduced to writing; and the language of the earlier Regulations shows that the practice is by no means a recent growth. In conditional sales, however, parol defeasances are not uncommon, although in recent years, they have become much less frequent than before. It must not, however, be understood that a verbal mortgage stands precisely in the same situation as a written mortgage which has been registered. The Indian Registration Acts, although they do not insist upon the necessity of a written instrument, when the laws of

the country do not require that the transaction should be evidenced by writing, give as a rule preference to registered instruments over parol agreements or declarations. Section 48 of Act VIII. of 1871, the present Registration Act, says,—“All documents, not testamentary, duly registered under this Act, and relating to any property whether moveable or immoveable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession.”

The section is not very happily worded, and the meaning of the words “agreement” and “declaration” has given rise to some discussion. There can be no doubt, however, as explained by Mr. Justice Markby in *Salim Sheik* against *Bydanath Ghuttuk*, that the word “agreement” in the Act is not intended to be used in the sense of what English lawyers call an executory agreement. It evidently embraces conveyances as well as contracts. It seems to me, however, that the language is not very happily chosen, and plausible arguments may be urged in support of a different view. (12 W. R., p. 217.)

While upon this subject a few words upon the real nature of a conventional mortgage may perhaps not be thrown away. A mortgage may be viewed in two different aspects. It is a contract creating a personal right so far as the promise of the debtor to repay the loan is concerned. But it is also a conveyance in so far as it passes to the creditor a real right in the property, which is charged with the repayment of the money. Now a real right, as I have already explained to you, is never conferred by a contract; but a mortgage is looked upon so much as a contract that it is precisely one of those transactions in which we are most likely to confound a contract with a conveyance. I shall show hereafter the importance of this distinction which seems to have been overlooked in some of the cases in the books.

Before dismissing the subject of registration, I wish to make one observation. You find that a parol mortgage is protected, only when it has been followed or accompanied by possession; and the reason is because the actual delivery of possession gives publicity to the transaction, and thus lessens the chances of fraud. It is upon this ground that the Court has refused to extend the protection to a case in which a merely constructive possession is delivered to a person already in actual possession either as tenant or under some other title. (*Kirtee Chunder Haldar* v. *Raj Chunder Haldar*, 22 W. R., p. 273.)

## SHORT NOTES.

### PRIVY COUNCIL.

#### *Hindu widow—Undivided family—Authority to adopt.*

According to the law prevalent in the Dravida country, a Hindu widow, without having her husband's express permission, may, if duly authorized by his kindred, adopt a son to him.

*The Collector of Madura v. Moottoo Ramalinga Sathupathy* (12, Moore's I. A. 397) referred to and approved.

*Semble*, in the case of an undivided family the requisite authority to adopt must be sought within that family, and cannot be given by a single separated and remote kinsman.

Speculations founded on the assumption that the law of adoption now prevalent in Madras is a substitute for the old and obsolete practice of raising up seed to a husband by actual procreation are inadmissible as a ground of judicial decision.

\* *Vide* I. L. R., 1, Mad. Series p. 69. (Appeal from Madras High Court) 1876, January 11th to 15th and 25th, March 24th—*Sri Virada Pratapa Raghunada Deo rs. Sri Brozo Kishoro Patta Deo*.

*Registration Act (VIII. of 1871), s. 76—District Court—Order refusing Registration—Proceeding to compel Registration—Review—Act XXIII. of 1861, s. 38—Act VIII. of 1859, s. 376.*

The Registration Act of 1871 gives power to the Government to appoint Districts and Sub-Districts for the purposes of registration; but the "District Courts" mentioned in the Act (except where the High Court when exercising its local jurisdiction is said to be a District Court within the meaning of the Act) must, in the case of a regulation province, be taken to import the ordinary Zilla Courts.

*Semble*.—The final words of the 76th section of the Registration Act, which declare that "no appeal lies from any order made under this section," apply to an order rejecting, as well as to an order admitting, an application for registration.

*Quare*.—Whether after an order has been made under s. 76 of the Act rejecting an application for registration, it is open to the parties benefited by a deed to propound it in, and to obtain its registration by means of, a regular suit? *Futteh Chund Sahoo v. Leelumber Singh Doss* (9, B. L. R., 433) referred to and distinguished.

An order rejecting an application for registration, under s. 76 of the Registration Act of 1871, being, in respect of the Court pronouncing it, a final order of adjudication between the parties, is so far in the nature of a 'decree' within the meaning of Act VIII. of 1859, as to fall within the operation of the sections of that Act which provide for the admission of a review.

S. 38, Act XXIII. of 1861, which enacts that "the procedure, prescribed by Act VIII. of 1859, shall be followed as far as it can be in all miscellaneous cases and proceedings which, after the passing of the Act, shall be instituted in any Court," renders the whole procedure of Act VIII. of 1859 including the power of admitting a review, applicable to a proceeding to compel registration under the Registration Act.

It may be competent to a Judge to entertain an application for a review, although such application contains no distinct allegation of an error in law in the order sought to be reviewed, nor any suggestion of the discovery of new evidence.

\* *Vide* I. L. R., 2, Cal. Series, p. 131, (Appeal from Calcutta High Court) the 24th May 1876—*Hadjee Abdoollah—Petitioner*; and *Reasut Hossein, vs. Hadjee Abdoollah and another*.

*Hindu Law—Adoption in the Dravida country—Widow's power to adopt with consent of Sapindas—Motives for making an adoption.*

According to the Hindu Law, a widow who has received from her deceased husband an express power to adopt a son in the event of his natural born son dying under age and unmarried, may on the happening of that event make a valid adoption.

*Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdry* (10. Moore's I. A., 279) *distinguished*.

Under the law which prevails in the Dravida country, a widow without any permission from her husband may if duly authorized by his kinmen adopt a son to him in every case in which such an adoption would be valid if made by her under written authority from her husband.

The observations of the Judicial Committee in the *Ramnad case* (12, Moore's I. A., 397) to the effect "that there should be such evidence of the assent of kinsmen as suffices to show that the act [of adoption] is done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive," considered and explained.

\* *Vide* I. L. R., 1, Mad. p. 174, (Appeal from Madras High Court) The 3rd November 1876—*Vellauki Venkata Krishna Rao vs. Venkata Rama Lakshmi and two others*.

*British territory in India, Power to cede—Proof of cession—Transfer of jurisdiction—Re-arrangement of jurisdiction within British territory—Statutes 3 and 4 Will. IV., Cap. 85, Section 43; 24 and 25 Vic., Cap. 67, Section 22; and 24 and 25 Vic., Cap. 104, Section 9—The Indian Evidence Act of 1872, Section 113—Territorial jurisdiction of British Court ceases on cession.*

Semble that the general and abstract doctrine laid down by the High Court at Bombay that it is beyond the power of the British Crown, without the consent of the Imperial Parliament, to make a cession of territory within the jurisdiction of any of the British Courts in India, in time of peace, to a foreign power, is erroneous.

Where an objection is taken to the territorial jurisdiction of a British Court, on the ground that the territory over which the jurisdiction of the Court extended has been ceded to a foreign power, such a cession must be regularly proved and cannot be established by uncertain inferences from equivocal acts.

An agreement on the part of the Government of India purporting to transfer certain villages forming part of a Regulation Province within the Bombay Presidency, and subject to ordinary British jurisdiction, to the extraordinary jurisdiction of the Political Agency of a Native State, does not constitute a cession of territory.

A re-arrangement of jurisdiction within British territory in India by the exclusion of a certain district from the Regulations and Codes there in force, and from the jurisdiction of all the High Courts, with a view to the establishment therein of a Native jurisdiction under British supervision and control, cannot be carried out except by legislation under the provisions of the Imperial Statutes 3 and 4 Will. IV., Cap. 85, Section 43, 24 and 25 Vic., Cap. 67, Section 22, and 24 and 25 Vic., Cap. 104, Section 9.

The Governor-General in Council being precluded by the Act 24 and 25 Vic., Cap. 67, Section 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territory in India, or as to the allegiance of British subjects, cannot by any legislative Act (*e. g.* by "The Evidence Act of 1872," Section 113) purporting to make a notification in the *Government Gazette* conclusive evidence of a cession of territory, exclude judicial enquiry as to the nature and lawfulness of that cession.

Where the foundation of the jurisdiction of a British Court over the subject matter of a suit and the parties thereto is territorial, and the territory by a valid cession ceases to be British, the jurisdiction of the Court can no longer be exercised whatever be the stage or condition of the litigation at the time of such cession.

\* *Vide* I. L. R., 2, Bom. Series, p. 367 (Appeal from Bombay High Court) the 13th, 15th, and 20th July 1875 and 16th February and 28th March 1876—*Damodar Gordhan vs. Deorjam Kanji*.

## NEW LIMITATION ACT.

*Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vic., Cap. 67.*

The Council met at Simla on Thursday, the 19th July 1877.

Present: His Excellency the Viceroy and Governor General of India, G.M.S.I., *presiding*, His Honour the Lieutenant-Governor of the Panjab, C.S.I., the Hon'ble Sir E. C. Bayley, K.C.S.I., the Hon'ble Sir A. J. Arbuthnot, K.C.S.I., Colonel the Hon'ble Sir Andrew Clarke, R. E., K.C.M.G., C.B., Major-General the Hon'ble Sir E. B. Johnson, K.C.B., the Hon'ble Whitley Stokes, C.S.I., the Hon'ble T. C. Hope, C.S.I., the Hon'ble F. R. Cockerell, and the Hon'ble B. W. Colvin.

The Hon'ble Mr. Stokes moved that the Reports of the Select Committee on the Bill for the limitation of suits and for other purposes be taken into consideration. He said that under ordinary circumstances, he would not have made this motion until the Council had returned to Calcutta. For the Bill dealt with the whole range of civil litigation in India, and the Government desired that Bills of so wide a scope should always, if possible, be passed at the winter sittings. But as the Bill provided expressly for several proceedings under the new Code of Civil Procedure (see, for instance, Section 14, clause 2 and Schedule 11; Nos. 11, 153, 160, 161, 169, 172, 174, 175) which were not provided for by Act IX. of 1871 it should come into force contemporaneously with that Code, that was to say, on the 1st of October 1877; and it should be passed and promulgated a sufficient time before that day to enable the new Act to be translated into the native languages and the public to become acquainted with its provisions. Moreover, the Bill had been carefully revised in Calcutta by a committee composed of Sir Arthur Hobhouse, Sir Edward Bayley, Mr. Cockerell and Maharaja Jotindra Mohan Tagore, who concurred in recommending that the Bill, as then settled, should be passed; the revised Bill was published, in order to elicit criticism in the *Gazette* of 31st March; few criticisms had since been received; few alterations in substance had since been made, and of these none, as Mr. Stokes thought the Council would admit, were of sufficient importance to require that the Bill should be republished and its passage postponed.



The first of these alterations was the omission, in section 6, of the paragraph which excluded from the provisions of the Limitation Act appeals from, and applications to review, decrees and orders of the High Courts in the exercise of their original jurisdiction. These appeals and applications were now regulated, in the case of the High Courts at Calcutta, Madras and Bombay, by rules made under the Charters of 1865. But, in the opinion of Mr. Justice Macpherson, there could be no possible reason for excluding them from the operation of the Limitation Act. Moreover, as Mr. Justice Kennedy had observed in his brief but valuable criticisms on the Bill.—

“There are many inconveniences in the present rule in the Calcutta High Court. The time for appeal now runs from the date of pronouncing the judgment, not from the day of the decree being passed. I think that this ought to be altered, as the effect of the judgment is not unfrequently mistaken until the decree is finally settled. Also the time for obtaining a copy of the judgment ought, as in the Mufassal, to be excluded; there is no refresher allowed for attendance to hear judgment, and, in the case of a written judgment especially, it is not always possible for Counsel to be sure what has been decided by the Bench, even if they be present in Courts constructed on such wretched acoustic principles as are those here.”

We had therefore provided, in accordance with the opinion of Sir Richard Garth, Mr. Justice Macpherson and Mr. Justice Kennedy, that the period for such appeals and applications should be twenty days (the period allowed for appeals from decrees by the present practice of the High Courts at Fort William and Bombay) from the date of the decree or order. The period allowed for appeals from orders was in the Bombay High Court twenty days, in the Calcutta High Court four days. We had followed the Bombay rule in this respect. Mr. Justice Kennedy saw no objection to our doing so, and Sir Michael Westropp had informed Mr. Stokes that, in the High Court at Bombay, the rule had worked very well. In computing these periods of twenty days, the time requisite for obtaining a copy of the decree appealed against or sought to be reviewed and of the judgment on which it was founded would under section 12, be excluded, and, under section 5, the Court would have power, in proper cases, to enlarge the period. The High Court at Allahabad had no ordinary original civil jurisdiction. But the period for appeals from,

and applications to review, decrees made in the exercise of its extraordinary original civil jurisdiction would, under Nos. 153 and 173 of the Second Schedule to the Bill, be ninety days, the period fixed under its present rules.

Under section 7 of the Bill, where a person entitled to institute a suit was a minor at the time from which the period of limitation was to be reckoned, he was entitled to institute the suit within the same period after he attained majority as would otherwise have been allowed from the time at which the cause of action arose. At the recommendation of Mr. Justice Turner and of Sayyid Mahmud, an Advocate of the North Western Provinces High Court, the distinguished son of a most distinguished father, we had excluded from this section suits to enforce a right of pre-emption. Sayyid Mahmud observed that "the limitation of one year for a claim of pre-emption is perhaps not unduly long if the pre-emptor is not under legal disability at the time of the sale. But this period can at any time be extended indefinitely, a circumstance which not only works a great hardship upon the vendor but also upon the vendee." Then, after citing a judgment of Mr. Justice Turner (*Indian Law Reports*, 1 All. 207) as to the evils resulting from the right of pre-emption, and quoting the *Hedaya*, he concluded by expressing an opinion that, under Muhammadan law, the limitation for a claim of pre-emption was considerably less than one year, and that it was doubtful whether the right of pre-emption was ever intended to be conferred upon persons suffering from a legal disability at the time of sale. Mr. J. W. Smyth, now one of the Judges of the Panjab Chief Court, also recommended that pre-emption suits should be excluded from the operation of section 7, on the ground that—"it would be an intolerable evil to allow a person, a minor at the date of the sale, to come into Court, it may be ten or fifteen years afterwards, and ask to have the sale transferred to him. The evil is not so much felt in provinces where the strict Muhammadan law of pre-emption applies, and where, unless a claim is at once made with certain forms, the right is forfeited. But in the Panjab no preliminary form of claim need be gone through (*vide* Act IV. of 1872, sections 9 *et seq*) ; and here a vendee of land may be kept for years in suspense, in fact till a year after all persons in a village who were minors at the time of sale have attained their majority. The mere statement of the case in this way is sufficient to show the absurdity of the rule as it affects pre-emption cases.

We have altered section 10 and the second Schedule in accordance with a suggestion of Mr. Justice Green, one of the Judges of the Bombay High Court, so as to preclude the litigation likely to arise from the use of the words "good faith," and to protect a purchaser for valuable consideration from an express trustee, whether the purchaser had or had not notice of the trust at the time of the purchase. In this respect, our law would then agree with the present English law of limitation (§ and 4 Wm. IV., c. 27, sections 2, 24, 25), save that the lapse of time necessary to give protection would be twelve instead of twenty years; and this difference would disappear on the 1st January 1879, when the statute 37 and 38 Vic., c. 57, would come into force.

Section 14 of the present law excluded the time of a defendant's absence from British India, unless service of a summons to appear and answer could, during such absence, be made under the Code of Civil Procedure. But the Calcutta Trades Association, from whom we had received some practical remarks on the Bill, pointed out that it was frequently difficult, if not impossible, to find the address of a debtor after his departure from this country, and that a compliance with the requirements of the Code was therefore not always reasonably practicable. Of course, where the summons could not be served, the clause requiring service would not apply, but it was proverbially difficult to prove a negative. The Committee felt the force of these remarks, and struck out the exception in question, which by the bye, did not occur in the corresponding provision of the English law (4 Anne, Cap. 16, section 19) as to persons absent beyond the seas.

In section 19 we had struck out the exception which allowed oral evidence to be given of an acknowledgment wrongfully destroyed by the person upon whom it was binding. The case was one which could seldom occur, since the plaintiff had ordinarily the possession of the document. We had thought it simpler to make no exception to the rule in this clause, which excluded oral evidence of such documents.

In section 20 we had extended the effect of part payment to all debts, whether arising out of a contract in writing or not. "Why," asked Mr. Wilkinson, the Recorder of Rangoon, "should a part payment endorsed on a promissory note by the payor, or one admitted as such, in his own handwriting in the payee's bill-book, be entitled to more consideration than when a customer signs to a payment on account of principal in a shopkeeper's book or on the bill which he has made out

in respect of articles that were purchased over the counter?" We thought, too, it would suffice to provide that the fact of part payment should appear in the handwriting of the person making it. The ordinary case of a debtor making a part payment by letter would thus be provided for.

We had provided not only that several partners or executors, but also several joint-contractors or mortgagees should not be chargeable by reason only of an acknowledgment or payment made by one of them. This was in accord with 19 and 20 Vic., c. 57, s. 14, and 3 and 4 Wm. IV. c. 27, sec. 28.

We had struck out the clause relating to successive trespassers, which was based on the opinion apparently held by the late Lord Romilly in *Dixon vs. Gayfere*. The Committee were not sure that the proposed rule was right, and in any case it would have been of little or no practical utility.

In the second Schedule we had made a few changes as to the time from which the periods begin to run. Thus, in the case of suits to enforce a right of pre-emption, the present law provided that the period should begin when the purchaser took actual possession under the sale impeached. But in the North-Western Provinces High Court a doubt had been raised (I. L. R. 1 All. 315) as to the application of this provision to cases in which the subject of the sale was an equity of redemption, a reversionary interest or any other thing that did not admit of what the High Court termed "visible and tangible possession." The Committee, after much consideration, had determined on making the time run in such cases from the time when the instrument of sale was registered.

Incidentally, the change would have the effect of promoting the use of written instruments in such transactions and of encouraging the practice of registration.

In the case of suits for money lent under an agreement that it should be payable on demand, we had made the time run from the date of the transaction instead of from the demand the date prescribed by the present law, the framer of which in this respect had followed a judgment of the Bengal High Court (6 Beng. 160), which judgment rested on what the authority of Mr. Justice Holloway (*quis jure peritior?*) emboldened Mr. Stokes to call a mistake of Austin's. It seemed unreasonable that a creditor should be able to give himself an unlimited time to sue by merely abstaining from making a demand. Moreover,

as Mr. Justice Innes, one of the Judges of the Madras High Court, observed, in a minute to which the Committee were much indebted—

“It is a well known principle of English as well as Continental law, that the words ‘payable on demand’ are not a condition. The creditor, by the clause, does not seek to impose a conditional obligation, he merely gives notice to the debtor that he is to be ready to pay the debt at any time when called upon. If the obligation depended upon a personal act of the creditor (as Savigny observes), it would be extinguished by his death before demand, which is not the case. Consistently with this view it has always been held in England that a debt payable on demand was a debt from the date of the instrument, on which date therefore the cause of action arose (*Norton v. Ellam*, and other cases), and that time runs from that date and not from date of demand.”

The Committee agreed with Mr. Innes in thinking it desirable that the law in India and that in England should be in accord on this point, as they were prior to the enactment of Act IX. of 1871.

No. 125 related to suits during the life of Hindu widows to have their alienations declared to be void except for their lives, and No. 141 dealt with suits for possession of land to which the plaintiff was entitled on the death of a Hindu widow. We had extended the scope of these Numbers so as to meet the case of Muhammadan widows. Mr. J. W. Smith informed us (and he was confirmed by the Panjab Government and by Sir Edward Bayley) that—“in the greater part of the Panjab, Muhammadan widows succeed to their husbands’ lands when there are no sons or descendants in the male line, and they hold such lands for life or till they marry again exactly in the same way as Hindu widows succeed. Suits to set aside alienations made by Muhammadan widows, or to have them declared void, except for the life or till the remarriage of the widow, are quite as numerous in the Panjab as suits to set aside alienations made by Hindu widows.”

This fact, coupled with the existence of the undivided family system among the Muhammadans of the Lower Provinces of Bengal, shewed how cautious we should be in assuming that the profession of Islam involved the adoption of the Muhammadan law of property.

We had thought it better to restore the limitation of sixty years in the case of suits for foreclosure and redemption and suits by the Secretary of State in Council. The reasons for this change were clearly stated by Mr. Naylor, the Remembrancer of Legal Affairs, Bombay :

“ There are many unredeemed mortgages of very old standing in this Presidency, and from the commencement of our rule we have always taught the people to think that there is virtually no period of limitation for the recovery of mortgaged property. The sudden change from sixty to thirty years will very much affect the nature of mortgage transactions, and whilst it can do no good it may do much harm. Sixty years is also, in my opinion, not too long a period to allow for suits on behalf of the Crown. I doubt, in fact, whether it is expedient to prescribe any limitation at all for such suits in a country where the rights of the State are so apt to fall into abeyance and get lost sight of; but if some period is thought necessary it should not be less than sixty years.”

As regards mortgages, Mr. Naylor's opinion was supported by the authority of Mr. Gore Ouseley, the Financial Commissioner, Panjab, and as regards suits on behalf of the Crown, by that of Colonel MacMahon, the Commissioner, Hissar Division.

We had extended from thirty to sixty days the period allowed for applications under sections 363 and 365 of the Code of Civil Procedure by persons claiming to be legal representatives of deceased plaintiffs and seeking to have their names entered on the record. Our reasons were two: first because last February, when the Bill was introduced, Maharaja Jotindra Mohan Tagore said that “ in most cases thirty days was the time of mourning for Hindus, and unless the time was extended, it might operate harshly; a man could not be expected to come forward and put in his claim within the period of mourning :” secondly, because Mr. Broughton, the Administrator General of Bengal, had also stated that thirty days seemed too short a time to obtain representation—“ at any rate,” he said, “ in my case, for it is the practice now to issue citations, in all but very exceptional cases, when I apply for letters of administration.”

The other alterations which we had made were comparatively unimportant. They were all minutely stated in the final report; and Mr. Stokes trusted that the Council would now allow the Bill to become law

It was, no doubt, imperfect and incomplete. For instance, a Limitation Act should certainly comprise rules as to the time of commencing prosecutions for the various offences under the Penal Code, and we should have inserted the necessary provisions as to this matter, had we

not felt the need of consulting the Local Governments before making so important an addition to our law, and for this there was no time. But such as it was, Mr. Stokes could honestly say that no pains had been spared by Sir Arthur Hobbhouse, Sir Edward Bayley, Mr. Cockerell and himself to make the Bill accurate and useful.

It would doubtless require repairs in the course of six or seven years. "Time," said Lord Plunket, speaking of the law of prescription, "Time holds in one hand a scythe, in the other an hour-glass. The scythe mows down the evidence of our rights, the hour-glass measures the period which renders that evidence superfluous." The great orator had he been familiar with Indian legislation, would have rendered his metaphor complete by adding that the frame-work of his hour-glass would certainly decay, the glass be broken and the sand escape.

The Motion was put and agreed to.

The Hon'ble Mr. Stokes then moved that the Bill as amended be passed. He said that he wished to supply an omission in his remarks on the former motion and to notice the recommendation made by certain officers of Bombay and the Panjab, and by the Calcutta Trades Association, that the period allowed for suits for unsecured debts should be extended from three to six years. If the matter were open at present to alteration, he would be inclined to agree with those gentlemen, especially as the English law of limitation for actions of debt grounded on simple contract was six years after the cause of action had arisen, and the facilities for recovering debts were certainly less in India than in England. But we must remember first that the present period of three years had been established in India since 1859, and though he could not speak positively as to the reason why so short a time had been fixed, one might fairly conjecture that it was owing to the fact that written evidence of payment was much more liable to destruction in this country than it was in England. Secondly, before making so important a change in the law, it would be necessary to refer the point to all the Local Governments; and judging from an experience now extending to nearly twelve years, the answers to that reference would certainly not be received and considered by the Home Department for six months, that was to say, nearly four months after the new Code of Civil Procedure (with which this Bill should come into force simultaneously) would have begun to operate. No doubt, the commencement of the Code might be postponed. But this would require further legislation; and the post-

ponement might perhaps re-open questions which were now closed and would certainly for some months deprive the debtor-class of the benefits which the Code was intended to confer on them, and which, we had been assured, were urgently required. Mr. Stokes hoped, therefore, that the Council would allow the Bill to pass to-day, and it would give some comfort to the gentlemen in question, and to the Hon'ble Mr. Hope, who, he believed, sympathised with them, if he mentioned briefly the alterations in favour of the creditor which would be made by this Bill if it were allowed to pass as it stood. First of all, the Bill provided for the case of a creditor affected by double or successive disabilities. Secondly, where a debtor was absent from British India, the Bill excluded the time of his absence, whether the creditor could or could not serve him with a summons to appear and answer. Thirdly in the case of part payment of principal, the Bill merely required that the fact of the payment should appear in the handwriting of the debtor. As the law now stood, the debt must have arisen from a contract in writing, and the payment must appear not only in the handwriting of the debtor, but on the instrument, or in his own books, or in the books of the creditor. After the Bill had come into force, a part-payment of the amount of a tradesman's bill or a banya's account endorsed on the bill or account by the debtor would give a new period of limitation. In these three respects the position of the creditor would be distinctly improved by the Bill.

The Hon'ble Mr. Hope asked whether he had rightly understood the Hon'ble Member to say that he thought the Bill would probably require amendment in six or seven years.

The Hon'ble Mr. Stokes replied in the affirmative.

The Hon'ble Mr. Hope remarked that in that case he could only express his regret that so important a subject as that of the extension of the period of limitation for suits for money debts should be relegated to limbo, for so long a time, and expressed his opinion that it would be preferable to defer, if necessary, the passing of this Act, as well as the operation of the Civil Procedure Code, till next January, in order to afford sufficient time to have the question sifted even in a more thorough manner, if possible, than it had already been sifted by the Deccan Riots Commission and others, whose reports on the subject had already been some five or six months in the possession of the Select Committee.

The Motion was put and agreed to.



## CALCUTTA HIGH COURT.

*The 11th and 19th July, 1877.*

## PRESENT :

The Hon'ble Sir R. Garth, Kt., Chief Justice, and the Hon'ble Mr. Justice Macpherson.

ARCHIBALD KELLIE (Defendant) *Appellant*,*vs.*D. D. FRASER (Plaintiff) *Respondent*.*Jurisdiction—s. 327 of Act VIII. of 1859—Arbitrators—Award.*

The mere fact that the object of a partnership is the carrying on of a (tea) concern does not make a suit for adjustment of accounts and dissolution—a suit for land. Where in referring matters to arbitration one partner had the object of removing the other from the management of the partnership property and of enforcing a dissolution of the partnership upon such terms as the arbitrators should think proper, it was *held* that as he did not seek to obtain possession of, or to acquire a title to the tea garden, because that was already the property of the partnership, and as the effect of the award was only to dissolve the partnership and to dispose of the partnership property upon what the arbitrators considered the most just and reasonable terms, that therefore a suit instituted by one of the partners to carry out these objects is not a “suit for land” properly so-called, and that as the High Court might have given the plaintiff leave to bring such a suit in the High Court (although the land belonging to the concern lay outside the ordinary original jurisdiction of the High Court,) the High Court had also jurisdiction, under section 327 of Act VIII. of 1859, to confirm the award.

Messrs. Jackson and T. Apcar, instructed by Messrs. Orr and Harriss, for the defendant, appellant.

Messrs. J. D. Bell and G. H. Evans, instructed by Messrs. Chauntrell and Co., for the plaintiff, respondent.

This was an application under Section 327 of the Code of Civil Procedure to make an award of arbitrators a rule of Court, and it was opposed on the ground that the Court had no jurisdiction, as the effect of the award would be the sale of land in Darjeeling, and the case was therefore one involving the title to land within Section 12 of the Letters Patent.

In the first Court, the learned Judge (Kennedy, J.) made the award a rule of Court.

GABRIEL, C. J.—This is an appeal against an order and decree made by Mr. Justice Kennedy, confirming an award made by two arbitrators under Section 327 of the Civil Procedure Code.

The facts were these. By a deed dated the 12th of April 1876 Mr. Kellie and Mr. Fraser became partners in the business of a tea garden at Darjeeling, of which they were the owners in certain shares; and the deed contained a clause under which any dispute or difference which should arise between them about the partnership business, or the rights, duties or liabilities of either of them, was to be referred to arbitration as therein provided.

In the month of August 1876 differences did arise between the partners, which were referred to arbitration, and an award was made; but as some irregularity had occurred during the proceedings, the Judge of this Court refused to confirm the award.

Mr. Fraser's solicitors then, by letter dated the 29th of December 1876, required Mr. Kellie to refer to arbitration the following questions:—

1. Whether you are bound forthwith to execute a mortgage to Mr. Fraser of your rights and interest in the estate in terms of the deed of partnership.

2. Whether you are bound to furnish accounts and estimates to Mr. McIntosh as agent.

3. Whether you are liable to Mr. Fraser for any, and what sum in respect of money misapplied, for damage caused by your conduct, or costs incurred thereby.

4. Whether the partnership ought not to be dissolved, and if so, upon what terms.

Mr. Leslie thereupon, as Mr. Kellie's solicitor, named Mr. Shepherd as his arbitrator, and required Mr. Fraser to name an arbitrator on his part; and Mr. Fraser then nominated Mr. Kellner.

Mr. Shepherd, however, after much delay, refused to act as arbitrator, and Mr. Kellner then appointed Mr. Reily to act in his stead.

Mr. Kellner and Mr. Reily subsequently made an award, dated the 7th May last, to the following effect:—

They found a sum of Rupees 19,776-5-11 to be due from Mr. Kellie to Mr. Fraser. They directed Mr. Kellie's share in the partnership property to stand charged with that sum, and they ordered that Mr. Kellie should forthwith execute a mortgage of his said share to Mr. Fraser to secure the money.

They further found that Mr. Kellie had been, and still was, persisting in a course of conduct prejudicial to the property, and they

therefore ordered a dissolution of the partnership upon certain terms, and

Lastly. They ordered that the tea garden should be sold by Mackenzie, Lyall and Co. at Calcutta, under certain conditions.

This award was duly confirmed by Mr. Justice Kennedy by an order dated the 8th of June last, which is the subject of this appeal.

The appellant, Mr. Kellie, contends—

1st. That this Court had no jurisdiction to confirm the award, and

2ndly. That the authority of the arbitrators was revoked by both parties before the award was made.

In support of the first objection, it has been argued that the only Court competent to confirm the award under Section 327 was the Court in which a suit must have been brought to settle the differences between the parties, if those differences had not been referred to arbitration, and that as the subject matter in dispute was a tea garden at Darjeeling, and as both the litigants were resident there, the suit would have been a suit for lands, and must have been brought in the Darjeeling district, and therefore that the Darjeeling Court was the only one capable of confirming the award.

The answer to this contention on the part of Mr. Fraser was that the suit under such circumstances would not have been a "suit for land" within the meaning of Section 12 of the Letters Patent, and that as a part of the cause of action arose in Calcutta, inasmuch as the deed of partnership was executed there, the High Court might, although Mr. Kellie was resident at Darjeeling, have given leave to Mr. Fraser to bring this suit in the High Court; and that any Court in which such a suit might have been brought would have been "the Court having jurisdiction" over the matter in dispute within the meaning of Section 327.

Upon this point, we have been referred to several authorities, some of which have been discussed by the learned Judge in the Court below; and particularly to the late case of the *Delhi Bank vs. Wordie* (1 Indian Law Reports, Calcutta, p. 249), where it was held that a suit brought for the purpose of compelling the sale of a trust property was a "suit for land."

It will be observed however that in all or almost all the cases upon which the appellant relies, the suit was brought for the purpose of

acquiring the possession of, or of establishing a title to, or an interest in the property which was the subject of dispute, more particularly in the case of the *Delhi Bank vs. Wordie*, where the object of the petitioner was to establish the title of certain trustees to a share in a portion of the trust property claimed by a person of the name of Lightfoot, and the establishment of this title was an essential element of the entire claim.

Now, in this case, it clearly appears, both from the description of the matters in difference and from the award itself, that Mr. Fraser's real object was to remove Mr. Kellie from the management of the partnership property, and to enforce a dissolution of the partnership upon such terms as the arbitrators should think proper.

He did not seek to obtain possession of, or to acquire a title to the tea garden, because that was already the property of the partnership, and the effect of the award was only to dissolve the partnership, and to dispose of the partnership property upon what they considered the most just and reasonable terms.

I consider therefore that any suit instituted by Mr. Fraser to carry out these objects would not have been a "suit for land," properly so called; and that as the High Court might have given Mr. Fraser leave to bring such a suit in the High Court, that Court had also jurisdiction, under Section 327, to confirm the award.

As regards the other point, *viz.*, the alleged revocation of the submission to the arbitrators, I am of opinion that the evidence relied on by the appellant is not sufficient to justify us in finding that a revocation did in fact take place.

It is true that pending the proceedings, a telegram was sent from Darjeeling by both parties to Calcutta in these words, "Stay further proceedings; arrange matters here;" but having referred to the circumstances under which that telegram was sent, and to the subsequent correspondence and conduct of the parties, we do not consider that this telegram operated, or was even intended to operate, as an absolute revocation of the submission.

I think therefore that the appellant has failed upon both grounds, and that the appeal should be dismissed with costs on scale 2.

**MACPHERSON, J.**—I also think that this appeal must be dismissed.

A suit the object of which has to deal with the matters, the subject of this arbitration, might certainly, in my opinion have, with the leave

of the Court first obtained, been instituted on the original side of this Court. The partnership deed having been executed in Calcutta, it seems to me that, according to the current of decision here, it is impossible to say that no part of the cause of action arose within the local limits of the ordinary original civil jurisdiction.

Of course if the suits were a suit for land, within the meaning of Section 12 of the Letters Patent of 1865, there would be no jurisdiction, the whole land lying in Darjeeling. But it is not a suit for land within that section. There is no dispute as to the title to the land. The questions at issue relate to the partnership between Kellie and Fraser, the mode in which its business has been and ought to be conducted, and the adjustment of accounts and winding up of the partnership. The mere fact that the object of the partnership was the carrying on of a tea concern does not make a suit for adjustment of accounts and dissolution—a suit for land. If it did, then this result would follow that, although all the members of a partnership were permanently resident in Calcutta, and the chief business of the partnership was at the time of suing, and always had been conducted in Calcutta, a suit for an account and dissolution would not lie here, if one asset of the partnership happened to be an indigo factory or a tea garden in the Mofussil. Yet, in the case suggested, there can be no manner of doubt a suit could be entertained by this Court on its original side; and such suits have, in fact, been repeatedly entertained.

The peculiarity in the present case is that the defendant Kellie is not personally subject to the jurisdiction at all, save by reason of parts of the cause of action (to wit, the execution of the partnership deed) having arisen in Calcutta. Had he been personally subject, by reason of residing in Calcutta, probably the question which has been raised would never have been suggested.

Some discussion has taken place as to the effect of the judgment of the Court in the case of the Delhi Bank *vs.* Wordie. But I cannot gather from the report that the decision of the Appellate Court in any way modified or altered the earlier decisions. For the only point actually decided by the Appellate Court is that as the owner of a two annas' share of the property denied that he had ever conveyed his share to the defendants, to whom it was alleged to have been conveyed as trustees, the question of title as to these two annas was directly in issue, and therefore the suit was a suit for land and could not be entertained.

On the whole, I have no doubt that a suit might, with the leave of the Court first obtained, have been instituted here. And if a suit would have lain there, it appears to me that the Court had jurisdiction under Section 327 to order this award to be filed. I agree with Mr. Justice Kennedy in declining to attach to the words of that section "the Court having jurisdiction in the matter to which the award relates," the limited and a special meaning contended for, and in construing them as meaning *any* Court having jurisdiction to entertain a suit for the matter to which the award relates.

I further agree in the opinion that there was no revocation of the authorities to the arbitrators.

### CALCUTTA HIGH COURT.

*The 20th July, 1877.*

FULL BENCH.

Before the Hon'ble Sir R. Garth, *Kt.*, *Chief Justice*, and the Hon'bles L. S. Jackson, A. G. Macpherson, W. Markby, and W. Ainslie, *Judges*.

RAJ KUMAR SINGH and others (Defendants) *Appellants*,

*vs.*

SAHEBZADA RAI (Plaintiff) *Respondent*.

*Public Road—Obstruction—Criminal Court—Civil Court.*

When the Civil Court finds that an obstruction to a public road causes a particular inconvenience of a substantial kind to the plaintiff, it can direct the defendant, who has placed the obstruction there, to remove it, notwithstanding that the Criminal Code contains provisions for the removal of obstructions in public thoroughfares by summary proceedings before a Magistrate.

This was a special appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 29th January 1876, reversing a decree of the Second Munsiff of Arrah, dated the 11th April 1874; and the material facts of the case are fully stated in the order of the learned Judge, referring the matter for the decision of a Full Bench, which was as follows:—

In this case the Lower Appellate Court has ordered the defendants to remove an obstruction which they had placed upon a public road near to the plaintiff's house. It is, in my opinion, sufficiently found that the plaintiff has suffered damage by the obstruction; and this not merely as one of the public, but as having his house in the vicinity of the

obstruction, so that it causes him a particular inconvenience of a substantial character. But there is a decision in the XXI. W. R., 145, that no order for the removal of an obstruction from a public road can be made by the Civil Court, even in such a case as this. On the other hand, there is a decision in the same volume, at p. 408, that a decree directing the removal of an obstruction is not erroneous in law.

I have been formally requested by the pleaders to refer this question to be Full Bench, and I do not think that in this state of the authorities I can refuse to do so.

The question referred is whether, when the Civil Court finds that an obstruction to a public road causes a particular inconvenience of a substantial kind to the plaintiff, it can direct the defendant, who has placed the obstruction there, to remove it.

If the answer to this question is in the affirmative, in my opinion the special appeal should be dismissed; if in the negative, the appeal should be allowed, and the suit dismissed, with costs in all the Courts.

W. MARKBY.

The following judgment of the Full Bench was delivered by

GARTH, C. J.:—We are of opinion that, as the obstruction in this case has caused special injury to the plaintiff, the Civil Court was perfectly justified in directing it to be removed.

The Criminal Code no doubt contains provisions for the removal of obstructions in public thoroughfares by summary proceedings before a Magistrate; but there is nothing in those provisions which shows that the legislature intended to deprive a private individual of the redress which the law affords him under such circumstances, by means of a civil suit.

The special appeal will therefore be dismissed, with costs.

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## DIFFERENT KINDS OF MORTGAGES.\*

[In continuation of page 203.]

I have already alluded to the practice which obtains in this country for the borrower, in the case of a mortgage by conditional sale, to convey the estate absolutely to the lender; the latter agreeing by a contemporaneous agreement, which is sometimes verbal, that he will reconvey the estate to the borrower on repayment of the loan. The question whether such parol agreement could be received in evidence to control the terms of a document which was on its face a deed of absolute sale, was raised in the Calcutta High Court in the case of *Kassinath Chatterjee v. Chundy Churn Banerjee* (5 W. R., p. 65), and was referred to a Full Bench, when a majority of the Judges returned an answer in the negative.

It is perhaps necessary to observe that the law laid down by the Court in *Kassinath Chatterjee* against *Chundy Churn Banerjee* does not in any way trench upon any rule of Hindu or Mahomedan law, neither of which, as I have already said, refuses to give effect to parol agreements.

“Admitting that the law allows sale of land or other contracts relating to land to be made verbally, it does not follow that, if the parties choose to reduce their contract into writing, they can bring forward mere verbal evidence to contradict the writing, and to show that they intended something different from that which the writing expresses and was intended to express.” “If a man writes that he sells absolutely, intending the writing which he executes to express and convey the meaning that he intends to sell absolutely, he cannot, by mere verbal evidence, show, that at the time of the agreement, both parties intended that their contract should not be such as their written words express, but that which they expressed by their words to be an absolute sale should be a mortgage.” (Per Peacock, C. J., in *Kassinath Chatterjee* against *Chundy Churn Banerjee*, 5 W. R., 68.)

The exclusion of parol evidence for the purpose of qualifying the terms of a written instrument rests upon the presumption that when parties choose to reduce the terms of a contract to writing, they intend to insert the whole of the terms. Any other rule would open the widest door to fraud and perjury.

\* *Vide* Tagore Law Lectures, 1875-76. Lecture III, by R. B. Ghose, Tagore Law Lecturer.



A distinction, however, is taken by the Court between parol evidence of an agreement and evidence of the "acts" of the parties, the Chief Justice being of opinion that parol evidence is admissible to explain the acts of the parties, as for instance, that the document purporting to be a conveyance was not accompanied or followed by possession.

It is perhaps not quite easy to discover the ground upon which the distinction is made,—a distinction which, as pointed out by a learned Judge, is hardly reconcileable with the principle upon which the exclusion of parol evidence is founded. In the case of *Madhub Chunder Roy* against *Gungadhar Shamuntho*, Mr. Justice Markby is reported to have said :—

"It seems to me to be very difficult to understand the distinction drawn between evidence of a parol agreement contradicting the terms of a written contract being inadmissible, and evidence of the parties contradicting the terms of such a contract being admissible. In all these cases, one starts with the proposition that there was a written instrument which unequivocally and unmistakeably declares the intention of the parties, and I should have thought that it was quite as objectionable, if not more so, to contradict the plain terms of the contract by what are called acts, by the Full Bench, which can only lead to an inference, than to contradict them by an express and unequivocal and unmistakeable parol arrangement between the parties. I should have thought that the principle was this, that when we have once got a clear expression in writing of that which professes to be the intention of the parties, that must conclusively be taken to be the relation which was intended to be created between them, and that to get at their intention, no other evidence, whether of contemporaneous acts or agreements ought to be admitted." (11 W. R., p. 451.)

• Since the above observations were made, the Legislature has passed the Indian Evidence Act, section 92 of which says,—“When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.”

The language of the Act is not, perhaps, wholly free from ambiguity,

but I venture to think that, as the rule is laid down broadly and without any qualification or reservation, parol evidence of the acts or conduct of the parties is no longer admissible for the purpose of varying the terms of a written instrument.

I have said that conventional mortgages may be created either by writing or by parol. They may also be either express or implied. There is one important class of mortgages,—I say class, because in English law they form a class by themselves,—in which the law implies a mortgage from the conduct of the parties. Thus, if money is borrowed on a deposit of title-deeds, the law implies an intention to charge the property covered by the title-deeds with the repayment of the money. This, I need hardly point out, is very different from a true legal mortgage, which is not based upon any express or implied consent of the parties. In English law, a mortgage of the kind is called an equitable mortgage, because following a well-known maxim, equity regards the transaction in the same light as a formal mortgage; and this sort of mortgage being recognised in equity is called an “equitable mortgage” as opposed to a legal mortgage. The expression is also applied to similar transactions between the natives of this country, although, strictly speaking, it can be properly applied only in a country in which law and equity are administered as two distinct systems.

Equitable mortgages, although very common in the Presidency towns, do not seem to be common in the mofussil. We, indeed, find an instance of it in an early case in the Sudder Dewany Adawlut, but the parties to the transaction seem to have been residents of Calcutta, and the difference of opinion between the learned Judges by whom the appeal was heard, shows that the case was one of the first impression, and that the transaction was by no means common at the time. The report of the case to which I refer is not very full. It would, however, appear that one Ramlochun Paul being heavily indebted to the plaintiff and being pressed for payment, made over to him the title-deeds of certain property belonging to himself. It does not, however, appear that the debtor, when he made over the title-deeds, expressly stated his intention to offer them as a security for the debt. The property was afterwards sold under an execution by the Sheriff, and the purchaser bought with notice of the plaintiff's claim. The plaintiff sought to enforce his lien on the property, contending that the purchaser under the execution had purchased the property subject to his lien. The Zillah Judge having

given judgment in favor of the plaintiff upon the ground that the deposit by the borrower of the title-deeds was equivalent to a mortgage, the decree was affirmed on appeal to the Sudder Dewany Adawlut, although, as I have already said, one of the Judges was inclined to think that the mere delivery of the title-deeds was not sufficient to clothe the creditor with the rights of a mortgagee. (6, Select Reports, p. 165.) Since the decision in the above case, the Mofussil Courts in Bengal have invariably given effect to a deposit of title-deeds as a valid simple mortgage, although, as I have told you, this is not an usual mode of giving security outside the Presidency towns.

In the case which I have cited from the Select Reports, the Court inferred an intention to create a mortgage from the mere fact of the delivery of the title-deeds to the creditor. The deposit of title-deeds, however, is sometimes accompanied by an agreement, either verbal or written, in which the intention to create a charge is expressly stated. When that is done, the transaction does not substantially differ from an express conventional mortgage; and there is no reason why, as between parties who can pass land without writing and without delivery of possession, such a transaction should not be given effect to. In a case in the Madras Presidency, in which the local Sudder Dewany Adawlut had refused to recognise the validity of such a transaction, Lord Kingsdown, in delivering the judgment of the Lords of the Judicial Committee of the Privy Council in appeal, is reported to have said:—"The decision of the Sudder Dewany Adawlut, so far as it respects the enforcement of the lien against the third and last defendants, appears to have proceeded upon the ground that the principles of the English law applicable to a similar state of circumstances ought not to govern the decision of that suit in those Courts. This was correct if the authoritative obligation of that law on the Company's Courts were insisted on. There is, properly, no prescribed general law to which their decisions must conform. They are directed in the Madras Presidency to proceed generally according to justice, equity, and good conscience. The question then is, whether the decision appealed against violates that direction or not. The Court of Appeal, reversing the prior decisions, has decided that the contract was not operative as a hypothecation, or pledge, even between the parties to it. Yet the evidence shows that the plaintiff looked not simply to the personal credit of the person with whom he contracted, but bargained for a security on land.

If any positive law had forbidden effect to be given to the actual agreement of the parties to create that lien, the Court, of course, must have obeyed that law. If the contract of lien were imperfect for want of some necessary condition, effect must have been, in like manner, denied to it as a perfected lien. But nothing of this sort is suggested in the pleadings, or proved. It is not shown that, in fact, the parties contracted with reference to any particular law. They were not of the same race and creed. By the Mahomedan law, such a contract as the one under consideration, for a security in respect of a contingent loss, would be one not of pawn, but of trust. (Hedaya, Vol. IV., p. 208, tit. 'Pawns.') It is not declared that any writing or actual delivery is essential to the creation of such trust by that law; but as the contracting parties are not both Mahomedans, that law would not have governed the question of the validity and force of their contract, even in the Supreme Court. The plaintiff is a Christian; the contract took place with parties living within the local limits of the Supreme Court of Madras, though it related to land beyond them. It is not shewn that any local law, any *lex loci rei sitæ*, exists, forbidding the creation of a lien by the contract and deposit of deeds which existed in this case; and by the general law of the place where the contract was made, that is, the English law, the deposit of title-deeds as a security would create a lien on lands, though, as between parties who can convey by deed only, or conveyance in writing, such lien would necessarily be equitable. In this case there is an express contract for a security on the lands, to which, no law invalidating it, effect must be given between the parties themselves." (9 Moo. Ind. App., 303.)

*(To be continued.)*

## CALCUTTA HIGH COURT.

*The 19th December, 1876.*

PRESENT :

Mr. Justice Markby and Mr. Justice Ainslie.

BRAMMOYE DASSEE\* on behalf of Brojo Nath Singh and

another (Plaintiffs) *Appellants*,

v.s.

KRISTO MOHUN MOOKERJEE, (Defendant) *Respondent*.*Res Judicata—Act VIII. of 1859, ss. 2 & 170—Hindu Widow—  
Reversioner.*

A, a Hindu widow, brought a suit to recover possession of her husband's share of certain joint property. After partially examining some of her witnesses, she cited the defendant as a witness, and on his failure to attend, her suit was dismissed. After the death of the widow, her daughter sued the same defendant on behalf of her two minor sons, as being entitled in reversion to their grandfather's share, to recover the share which was the subject of the former suit: the defendant was summoned as a witness, but failed to attend. *Held*, that the suit was not barred under s. 2, Act VIII. of 1859, as being a *res judicata*, until it was shown that the former decree had been obtained after a fair trial of the right, so as to bind not only the widow, but the reversioners. The defendant having failed to attend and give evidence on this point, the Court was justified in giving the plaintiff a decree under s. 170, Act VIII. of 1859.

MARKBY, J.—In this case we think the judgment of the first Court was a right judgment, and ought not to have been disturbed by the lower Appellate Court.

It appears that there were three brothers entitled to a certain property. A decree had been obtained against two of the brothers, Shib Prosad and Bhola Nath. Their rights and interests in the property were sold, and the defendant got into possession. The widow of one of the brothers then brought a suit for declaration of her title to one-third share of the property. An issue was raised whether that share was the right and interest of the plaintiff as alleged by her, or of Shib Prosad and Bhola Nath as alleged by the defendant. There were other parties to that suit, but that does not seem to be material. After the death of the widow, the heir of her husband brought the present suit for posses-

sion. The decree in the former suit was set up as a bar to the present suit; and an issue was raised whether or no that decree was a bar to the present suit.

The Munsif, who tried the suit, seemed to have had some doubt whether, in point of law, the former decree was a bar to this suit. He also held that there was no proper trial upon the issues raised in the former suit. He then went on to say that the plaintiff, in the present suit, had relied mainly upon the evidence of the defendant; and, inasmuch as the defendant having been summoned did not choose to appear in Court, he gave the plaintiff a decree under s. 170 of the Civil Procedure Code.

The District Judge entirely concurs with the Munsif in thinking that this is a proper case to be dealt with under that section; but thinks that section could not be applied to the present case, because in this case the plaintiff cannot show a legal right. What he means by that apparently is, that the legal right which the plaintiff sets up in this case is wholly barred by the decision in the former suit. But the District Judge seems to have overlooked this,—that there was in the present case not an absolute bar such as there would have been, if this were the case of a decree against the person through whom the plaintiff claims. The rule that a decree against the widow binds the reversioner is subject to this qualification, that there has been a fair trial of the right in the former suit. That is laid down in what is commonly called the *Shivagunga case* (1) and in the decision of this Court to the same effect, with which I entirely concur, in the case of *Mohima Chunder Roy Chowdhry v. Ram Kishore Acharjee Chowdhry* (2). It was there pointed out that the Privy Council, in a more recent case (3), have said that, while they adhere to the rule that the widow represents the estate of the reversioner for some purposes, it is her duty not only to represent the estate, but to protect it also.

Now, in this case, it is obvious that there were some grounds for looking closely to see what really took place in the former suit, because we find that the former suit was disposed of in a manner which, on the face of it, seems to be not satisfactory. The plaintiff in that suit, after having brought her suit; and after having partially examined one witness, declined to examine any of her other witnesses. She had also

(1) 9 Moore's I. A. 539.

(2) 15 B. L. R., 142; *vide* p. 159.

(3) *Nogender Chunder Ghose v. Sreemutty Kaminee Dasseo*, 11 Moore's I. A., 241.

cited the defendant, the same person who was cited to appear in this case. It does not, however, appear whether she made any real attempt to get the defendant into Court, or whether the summons was served upon him. Anyhow he never came into Court, therefore there was good ground for inquiring whether there was a fair trial of the question between the parties in the former suit, and whether the plaintiff performed her duty in protecting, not only her own interest, but the interests of the person who was to take after her death.

Upon that question the evidence of the defendant is most important. Therefore the Court has a perfect right to say that the decree in the former is not a bar to this suit, until there had been some inquiry as to how it was obtained. And the defendant refusing to come in to give his evidence upon that point, the Court would be justified in dealing with the case under s. 170 of Act VIII. of 1859. We may assume for the purposes of this judgment that the decree in the former suit would have been a bar to the present suit, if it had been properly obtained; but that would not in any way prevent the Court from inquiring into the question whether it was so or not. Having regard to the circumstances which I have mentioned, the Munsif was right in dealing with the case under s. 170. We think, therefore, that the judgment of the first Court was right and ought to be restored, and that of the lower Appellate Court reversed. The plaintiff will get the costs in this Court and in the lower Appellate Court.

### THE DOCTRINE OF CAKES OR PINDAS.\*

Baboo Krishna Kamal Bhattacharya, reputed for his eminent scholastic attainments, formerly Professor of Sanskrit in the Calcutta Presidency College and now a vakeel of the Calcutta High Court, has recently published a pamphlet entitled "On some unsettled questions of Succession under the Bengal School of Hindu Law." On a perusal of this little book, the reader will find it to be a clear exposition of the doctrine of funeral cakes or *pindas*, upon which the whole fabric of the Hindu law of succession is based, and will be convinced that the author has shown his great learning and researches respecting Hindu Law in elucidating the said doctrine, in examining the rules laid down by the late

\* A pamphlet entitled "On some unsettled questions of Succession under the Bengal School of Hindu Law, by Krishna Kamal Bhattacharya, B. L. : Calcutta, Bonnerjee & Co., 1877."

Justice Dwarka Nath Mitter in the case of *Guru Govindo Shaha* in the 13th W. R., F. B., p. 49, and in criticising their construction by Sir Richard Couch in the case of *Govind Proshad Talookdar* in the 23rd W. R., p. 117. The author has admirably dealt with his subject. The conclusions arrived at by him seem to be sound and well-founded. There is no doubt whatever that this little work will be an important addition to our legal literature. The author has fixed one Rupee as its price, but in our estimation it is worth considerably greater. We feel sure that the work will be found by the Bench and the Bar to be of great practical utility. In recommending it to the public and in justification of our remarks we make the following extracts from it:—

In the preface, the author says “ The following pages are an attempt to contribute to the removal of the present unsettled condition of the Law of Succession under the Bengal School. In substance, they embody the result of a comparison of certain passages of the *Dáyabhága* with the celebrated judgment of the late lamented Justice Dwarka Nath Mitter, in the leading case of *Guru Govindo Shaha*, reported in the 13th Weekly Reporter, Full Bench Rulings, page 49. The conclusion at which I have arrived by this comparison is that the rules of succession propounded by Dwarka Nath Mitter in that judgment have been admirably generalized from the details of the *Dáyabhága*, and that except in two individual instances, these rules are reconcilable with all that is contained in the *Dáyabhága*. Recently, however, a decision has been made by Sir Richard Couch, reported in the 23rd Weekly Reporter, p. 117, in the case of *Gobindo Proshad Talookdar*, wherein that learned Judge has construed the rules of Dwarka Nath Mitter, in a manner that limits their operation and makes them irreconcilable with the *Dáyabhága*. I have endeavoured to show how those rules should be construed in a different way, so that their departure from the indications of the *Dáyabhága* may be as small as possible. As by far the greater portion of these pages deals with the doctrine of funeral cakes, I subjoin the fundamental propositions of that doctrine, together with the rules laid down by Dwarka Nath Mitter, in order that the purport of much of what I have written may be readily comprehended by persons who are not accustomed to speculate on these topics.

*Fundamental Propositions of the Doctrine of Cakes.*

1. A male person offers cakes to his father, grandfather and great-



grandfather in the paternal line, and also to his mother's father, grandfather and great-grandfather in the maternal line.

2. A is said to be sapinda to B if he gives pinda or cakes to B, if he receives cakes from B, or if both A and B give cakes to a common ancestor C.

*Rules laid down by Dwarka Nath Mitter.*

1. Among Sapindas, those who are competent to offer funeral cakes to the paternal ancestors of the deceased proprietor, are invariably preferred to those who are competent to offer such cakes to his maternal ancestors only, for the first kind of cakes are of superior religious efficacy in comparison with the second.

2. Those who offer a larger number of cakes of a particular description, are preferred to those who offer a less number of cakes of the same description.

3. Where the number of such cakes is equal, those that are offered to nearer ancestors, are preferred to those offered to more distant ones."

Then after fully and clearly explaining the doctrine of cakes and supporting his arguments by quotations from various authorities, the author in conclusion says "The only way in which we can preserve the general applicability of the rules of Justice Dwarka Nath Mitter, so as to occasion the least possible interference with their integrity, is to add a proviso after the second rule, and so to construe the three rules that the cases of the father's, grandfather's and great-grandfather's daughter's sons, may not be placed beyond the sphere of their application.

The second rule is :—

' Those who offer a larger number of cakes of a particular description, are invariably preferred to those who offer a less number of cakes of the same description.'

This rule fails in the case of the brother's son's son, who, although the giver of only a single cake, (namely to his own great-grandfather, who is the same as the proprietor's father), in which the deceased proprietor participates, is yet expressly preferred by the Dáyabhága (Ch. XI., S. vi., Para. 6) to the father's whole brother of the deceased, although the father's whole brother gives two cakes in which the de-

ceased participates. It also fails in the instance where the father's father excludes father's brother, although the latter offers two cakes shared by the deceased, while the former only one such.

The proviso, therefore, that we should annex to the second rule would be :—

Provided that, if, of two candidates for heirship, one offers a cake to the father of the deceased, he is in every case to be preferred to one who does not do so.

Provided also, that in every case, the collateral heirs shall succeed after the common ancestor from whom they descend.

It will be remembered that the reason assigned by Jímútaváhana for preferring the brother's son's son to the father's whole brother is that the former gives pinda to the father of the deceased, who is the principal person to be thought of; instead therefore of making of it, an individually exceptional case, we turn it into a general proposition, founded upon the reason which we find assigned in our work of authority.

As to the second part of the proviso above, this has become necessary, in order to explain the succession of the father's father in exclusion of the father's brother; for in such a case, father's father, being the first ancestor common to the father's brother and the deceased, is, by the application of the latter part of the above proviso, succeeds preferentially.

The other precaution that we should observe in the application of the second rule is, that by the expression, 'cakes of a particular description,' we must understand, 'cakes of either of the two great divisions,' cakes offered to the paternal ancestors of the deceased proprietor being included in one of these two divisions, and cakes offered to the maternal ancestors of the deceased being included in the other. In this way, we would not exclude the cakes offered by the sapindas of the daughter's-son kind, (if we may be allowed to make use of such an expression), on the paternal side of the deceased proprietor, but would take into account every cake that is given to any of the paternal sapinda ancestors of the deceased be it even offered on the mother's side of the giver.

What then, it will be asked, becomes of the principle, that cakes presented to the maternal ancestors are secondary, the principle namely which is found in Colebrooke's Digest, and which was the ratio decidendi in the case reported in 23 W. R. p. 117. Our answer is, that the said

principle is of great service in explaining a certain peculiarity in the law of succession. It will be found, upon examination of Paras. 8, 9 and 10, S. vi., Ch. XI., of the *Dáyabhága*, that the plain intention of the author is, that all the qualified descendants of the father must be exhausted, before the inheritance can rise to the grandfather; similarly neither the great-grandfather nor his descendants can come in, so long as any qualified descendant of the grandfather exist. And this successive ascent of the inheritance from one generation to the next above, may be well explained by the second and the third rules of Justice Mitter. But at the same time a gap remains in the explanation of the law of succession; for instance, it remains unexplained why the father's daughter's son should be postponed to the father's descendants, as far as the great-grandson, in the male line. Now, the aforesaid principle found in the *Digest of Colebrooke*, that cakes presented to the maternal ancestor are secondary, would well explain this peculiarity. But this principle must be limited to the case of the descendants of each sapinda ancestor taken apart in each generation; in other words, we must say that the father's descendants of the daughter's-son kind are postponed to the father's descendants, who are not of that kind. So, the grandfather's descendants of the daughter's-son kind are postponed to his descendants who are not of that kind. So on to the great-grandfather. But never should a father's descendant of the daughter's-son kind be postponed to a grandfather's descendant of an opposite kind. In the case reported in the 23rd Weekly Reporter, p. 117, Sir Richard Couch has held contrariwise, and has thereby turned the cases of father's, grandfather's and great-grandfather's daughter's sons into exceptional ones, although it is almost certain, that the special reason which he thought applied to those individuals does not exist at all; that there is no reason to suppose that the deceased proprietor is in the slightest degree more benefited, in the spiritual sense, by his grandfather's daughter's son, or by his great-grandfather's daughter's son, than he would be by his brother's daughter's son. On the contrary, it is certain that the brother's daughter's son offers two cakes in which the deceased participates, while the great-grandfather's daughter's son offers only one such. In fact it cannot be imagined into what a state of uncertainty our law of succession will again be cast, if we insist upon the correctness of the proposition that a grandfather's great-grandson in the male line excludes a brother's daughter's son. Such a proposition would no doubt be conformable to

the rules of succession under the Mitakshara law, as that law in every case prefers the *gotraju* or agnatic relatives to the *bandhu* or cognate ones. But nothing can be farther from the spirit of the Bengal law, than to hold an agnatic descendant of a more distant ancestor superior to a cognate one of a nearer ancestor. We are the more concerned at the fact of such having been authoritatively held, because our succession law had all but attained a state of certainty under Justice Dwarka Nath Mitter's rules. Now that those rules, admittedly founded upon the indications to be found in Jímútaváhana's work, have been declared to be inapplicable to three individual instances in the *Dáyabhága*, which are supposed to be governed by a special reason, that does not really exist, the result will be that every case of disputed succession will be a bone of contention between propounders of special reasons, which are in plenty in the books of Hindu Law.

We have above pointed out how by a slight modification the rules of Justice Mitter may be made conformable to all the individual cases given by Jímútaváhana; we have also tried to show how the principle of Jagannatha may be availed of, in order to explain the inferior claims of the heirs of the daughter's son among the descendants of each individual ancestor, taken apart. Our belief is, that thus modified and supplemented, Justice Dwarka Nath Mitter's rules will be found to be a satisfactory guide in the determination of every possible question of disputed succession.

We do not mean to say that these rules can be reconciled with every thing contained in the three other Bengal treatises of Raghunandana, Srikrishna, and Jagannatha. But that is not of much consequence, provided that the rules remain conformable to the *Dáyabhága*. The three other authors are but the disciples of Jímútaváhana; and none of them seems to have ever tasked themselves to find out general rules, so as to comprehend all the variety of cases. The *Dáyabhága* itself has omitted to lay down general propositions, by the simple application of which we might determine the superior or inferior rights of any two of the remoter sapindas. The first attempt in that regard was made by Justice Mitter in the leading case of *Guru Gobindo Shaha* (13 W. R. F. B. 49.) The attempt has been all but entirely successful. Our best endeavour at present therefore should be to keep them intact, as much as we can, without coming into collision with the direct indications to be found in the *Dáyabhága* our paramount work of authority.

### TABLE OF SAPINDAS SHOWING THE AMOUNT OF SPIRITUAL BENEFIT CONFERRED BY EACH.

*N. B.*—Pindas or cakes may be characterised as of three kinds. When A gives pinda directly to B, as a son to his father, grandson to his grandfather, &c., there the pinda may be said to be a direct one; when A only shares with another ancestor pindas given by a third to that ancestor, there the pindas may be said to be shared by A; for example, A shares pindas given by his brother to his father.

Pindas are called secondary, when they are given to the maternal ancestors of the giver.

#### IMMEDIATE SAPINDAS.

1. Son gives 1 pinda direct, and 2 shared.
2. Grandson 1 „ „ 1 „
3. Great-grandson 1 „ „ none „
4. Daughter's son 1 direct, but secondary, & 2 shared but secondary.
5. Son's daughter's son, 1 direct secondary, 1 shared secondary.
6. Grandson's daughter's son 1 ditto none ditto.

#### SAPINDAS ON THE FATHER'S SIDE.

1. Father ... .. none direct, 2 shared.
2. Brother .. .. ditto 3 ditto.
3. Brother's son ... .. ditto 2 ditto.
4. Brother's son's son ... .. ditto 1 ditto.
5. Father's daughter's son ... .. ditto 3 ditto secondary.
6. Brother's daughter's son ... .. ditto 2 ditto ditto.
7. Brother's son's daughter's son .. ditto 1 ditto ditto.
8. Grandfather ... .. ditto 1 ditto.
9. Father's brother ... .. ditto 2 ditto.
10. Father's brother's son ... .. ditto 2 ditto.
11. Father's brother's son's son ... .. ditto 1 ditto.
12. Grandfather's daughter's son .. ditto 2 ditto secondary.
13. Father's brother's daughter's son .. ditto 2 ditto ditto.
14. Father's brother's son's daughter's son ... .. ditto 1 ditto ditto.
15. Great-grandfather ... .. ditto none shared.
16. Grandfather's brother ... .. ditto 1 shared.
17. Grandfather's brother's son ... .. ditto 1 ditto.

- 
- |     |  |                          |
|-----|--|--------------------------|
| 18. | Grandfather's brother's son's son                  | none direct, 1 shared.   |
| 19. | Great-grandfather's daughter's son .. ...          | ditto 1 ditto secondary. |
| 20. | Grandfather's brother's daughter's son ... ..      | ditto 1 ditto ditto.     |
| 21. | Grandfather's brother's son's daughter's son... .. | ditto 1 ditto ditto.     |

As regards sapindas on the mother's side, none of the pindas given by them are shared by the last owner; in their case, the consideration is, how many pindas given by them are such as the deceased would have given, on his own part. Therefore, against the name of each sapinda, we place a figure to indicate the number of persons who are the common recipients from that particular sapinda and the deceased.

#### SAPINDAS ON THE MOTHER'S SIDE.

- |     |  |        |  |
|-----|--|--------|--|
| 1.  | Mother's father  | ... .. | 2 pindas that deceased would give.                     |
| 2.  | Mother's brother                                       | ... .. | 3  |
| 3.  | Mother's brother's son                                 | ... .. | 2  |
| 4.  | Mother's brother's son's son...                        | ... .. | 1  |
| 5.  | Mother's sister's son                                  | ... .. | 3 secondary.   |
| 6.  | Maternal uncle's daughter's son                        | ... .. | 2 ditto.   |
| 7.  | Maternal uncle's son's daughter's son                  | ... .. | 1 secondary.   |
| 8.  | Mother's grandfather                                   | ... .. | 1 pinda given by the deceased.                         |
| 9.  | Mother's father's brother                              | ... .. | 2  |
| 10. | Mother's father's brother's son                        | .. ..  | 2 given by the deceased.                               |
| 11. | Mother's father's brother's son's son                  | ... .. | 1 ditto.   |
| 12. | Mother's grandfather's daughter's son                  | ... .. | 2 secondary.   |
| 13. | Mother's father's brother's daughter's son             | .. ..  | 2 ditto.   |
| 14. | Mother's father's brother's son's daughter's son .. .. | ... .. | 1 ditto.   |
| 15. | Mother's great-grandfather ..                          | ... .. | None; but receives a pinda and is therefore a sapinda. |
| 16. | Mother's grandfather's brother gives                   | ... .. | 1 pinda given by the deceased.                         |
| 17. | Mother's grandfather's brother's son                   | ... .. | 1  |
| 18. | Mother's grandfather's brother's son's son             | ... .. | 1  |

19. Mother's great-grandfather's daughter's son 1 secondary.  
 20. Mother's grandfather's brother's daughter's  
     son                      ...                      ...                      1 ditto.  
 21. Mother's grandfather's son's daughter's son 1 ditto.

*The definition of a sapinda may be stated in three separate Propositions.*

- I. A is sapinda to B, if A gives pinda to B.  
 II. A is sapinda to B, if A receives pinda from B.  
 III. A is sapinda to B, if both give pinda to a common ancestor C.  
 All the immediate sapindas become so, in accordance with the Proposition I.

Nos. 1, 8 and 15 out of the sapindas on both the father's side, and the mother's side, become so, in accordance with the Proposition II.

All the rest of the sapindas on both the father's and the mother's side, acquire that relationship, by virtue of the Proposition III.

TABLE OF SUCCESSION AS IT MAY BE DRAWN UP FROM  
 THE EXPRESS WORDS OF THE DAYABHAGA, WITH  
 REFERENCE TO THE PROPERTY LEFT BY A  
 HOUSE-HOLDER.

I.	Sapindas	Dáyabhága Ch. XI. S. vi. Para.	19
II.	Sakulyas	" " " "	21
III.	Samanodakas	" " " "	23
IV.	Spiritual Preceptor	" " " "	24
V.	Disciple	" " " "	24
VI.	Fellow-Student	" " " "	...
VII.	Persons of the same gotra dwelling in the same village ...	" " " " "	25 & 26
VIII.	Persons of the same pra- vara dwelling in the same village ...	" " " " "	25 & 27
IX.	Brahmins of the same village ...	" " " " "	26 & 27
X.	The King, except with regard to the wealth of a Brahmin ...	" " " " "	26 & 34

*Succession of the Class I. or of Sapindas.*

1. Son, and grandson whose father is dead, and great-grandson whose father and grandfather are dead. *Dáyabhága Ch. XI. S. i., Para. 34 ; S. vi. Para. 29.*
2. Grandson ... .. *Dáyabhága Ch. XI. S. i. Para. 43*
3. Great-grandson ... .. " " " " *43*
4. Widow ... .. " " " " *43*
5. Maiden daughter ... .. S. ii. " " *4*
6. Married daughter, who has,  
or is likely to have a son " " " " *8*
7. Daughter's son ... .. " " " " *25*
8. Father ... .. S. iii. " " *1*
9. Mother .. .. S. iv. " " *1*
10. Re-united whole brother ... .. S. v. " " *36*
11. Un-re-united whole brother and  
re-united half brother to-  
gether ... .. *Dáyabhága Ch. 2 S. vi. Para. 36*
12. Re-united half brother ... .. " " " " *36*
13. Un-re-united half-brother .. .. " " " " *36*
14. Re-united whole brother's son  
and S. v. Para. 39. " " " " *2*
15. Un-re-united whole brother's  
son and re-united half-  
brother's son together .. .. S. v. " " *39*
16. Re-united half-brother's son " " " " *39*
17. Un-re-united half-brother's son " " S. vi. " " *2*
18. Brother's son's son ... .. " " " " *6*
19. Father's daughter's son ... .. " " " " *7*

As far as father's daughter's son, the *Dáyabhága* has expressly specified, who is to succeed first, and who next after him.

After the father's daughter's son, the succession is indicated in general terms. Thus:—

- A. The descendants of the paternal grandfather, including the daughter's son, in the proximity by way of pinda. *Dáyabhága Ch. XI. S. vi. para. 9.*
- B. The descendants of the great-grandfather, including the daughter's son, in the same order. *Dáyabhága Ch. XI. S. vi. para. 9.*



C. Maternal uncle &c., who are the givers of pinda given by the deceased, paras. 12, 14, & 20.

*Succession of the Class II. or the Sakulyas.*

1. The three descendants of the deceased, from the grandson of the grandson of the deceased. Dáyabhága Ch. XI. S. vi. Paras. 21 & 22.
2. The descendants of the three ancestors from the great-great-grandfather upwards, who offer pindas to the eaters of lepa given by the deceased. Dáyabhága Ch. XI. S. i. para. 38 and S. vi. para. 22.

This is all the Dáyabhága states as to the succession of Sakulyas among themselves.

As to the succession of the Class III. or the Samanodakas, the Dáyabhága lays down no other rule except that they succeed after the Sakulyas.

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TABLE OF SUCCESSION IN ACCORDANCE WITH THE  
RULES LAID DOWN BY MR. JUSTICE DWARKA  
NAUTH MITTER, IN THE CASE OF GURU  
GOBINDO SHAHA, 13 W. R. F. B. 49.

1. Son.
2. Grandson.
3. Great-grandson.
4. Widow.
5. Unmarried daughter.
6. Married daughter, having or likely to have a son.
7. Daughter's son.
8. Father.
9. Mother.
10. Re-united whole brother.
11. Un-re-united whole brother and re-united half-brother together.
12. Un-re-united half-brother.
13. Brother's son. (1)

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(1.) The internal arrangement as among the different kinds of brother's sons is as follows:—

(a) Re-united whole brother's son.

(b) Un-re-united half-brother's son and re-united whole brother's son together.

(c) Un-re-united half-brother's son.

14. Brother's son's son. (2)
15. Father's daughter's son, or the son of a sister, whole or half.
16. Son's daughter's son.
17. Brother's daughter's son.
18. Son's son's daughter's son.
19. Brother's son's daughter's son, whether the brother be whole or half.
20. Grandfather.
21. Grandmother.
22. Father's whole brother. (3)
23. Father's half-brother.
24. Father's whole brother's son.
25. Father's half-brother's son.
26. Father's whole brother's son's son.
27. Father's half-brother's son's son.
28. Grandfather's daughter's son, whether it be the whole or half sister of the father.
29. Father's brother's daughter's son, whether the whole or half.
30. Father's brother's son's daughter's son, whether the brother be whole or half.
31. Great-grandfather.
32. Great-grandmother.
33. Grandfather's whole brother.
34. Grandfather's half-brother.
35. Grandfather's whole brother's son.
36. Grandfather's half-brother's son.
37. Grandfather's whole brother's son's son.
38. Grandfather's half-brother's son's son.
39. Grandfather's sister's son, whether the sister be whole or half.
40. Grandfather's brother's daughter's son, whether the brother be whole or half.

(2.) The internal arrangement as among different kinds of brother's son's sons is as follows:—

(a) Whole brother's son's son.

(b) Half-brother's son's son.

(3.) As among father's brothers also, the rule determining the preferential right on the ground of re-union is to be applied, as in the case of one's own brethren.

41. Grandfather's brother's son's daughter's son, whether the brother be whole or half.
42. Mother's father, or maternal grandfather.
43. Mother's brother, whole or half, or maternal uncle.
44. Maternal uncle's son.
45. Maternal uncle's son's son.
46. Mother's sister's son, whether the sister be whole or half.
47. Mother's brother's daughter's son, whether the brother be whole or half.
48. Mother's brother's son's daughter's son, whether the brother be whole or half.
49. Mother's father's father.
50. Mother's father's brother, whole or half.
51. Mother's father's brother's son, whole or half.
52. Mother's father's brother's son's son, whole or half.
53. Mother's father's sister's son, whether the sister be whole or half.
54. Mother's father's brother's daughter's son.
55. Mother's father's brother's son's daughter's son.
56. Mother's great-grandfather.
57. Mother's grandfather's brother, whole or half.
58. Mother's grandfather's brother's son, whole or half.
59. Mother's grandfather's brother's son's son, whole or half.
60. Mother's grandfather's sister's son, whole or half.
61. Mother's grandfather's brother's daughter's son.
62. Mother's grandfather's brother's son's daughter's son.

Then come Sakulyas, as follows—

63. Great-grandson's son.
64. Great-grandson's son's son.
65. Great-grandson's great-grandson.
66. Great-grandfather's father.
67. Descendants of No. 66 in the male line as far as the sixth degree ; the degrees are to be counted excluding himself. Then such of the descendants of No. 66 in the female line, as offer pinda to him.
68. Then great-grandfather's grandfather and his descendants of the same kind as those of No. 66, both in the male and in the female line.

69. Great-grandfather's great-grandfather and his descendants of the same kind, as those of No. 66, both in the male and in the female line.

Then the Samanodakas, viz. ;—

70. The seventh ancestor from the deceased, counting his father as one.
71. Then the descendants of No. 70 in the male line and such descendants of the daughter's-son kind, as offer pinda to No. 70.

So on as far as relationship with the deceased can be traced.

- N. B.—The Sakulya relationship extends as far as the sixth degree of ascent or descent.

See Dáyabhága, Ch. XI. S. vi. para. 21.

The Samanodaka relationship extends so far as common descent can be traced. See Vrihatmanu quoted in the Mitakshara, Ch. II. S. v. para. 6.

Lastly come the specified strangers, enumerated at the end of Appendix Nos. 2, 3, &c."

## SHORT NOTES.

### CALCUTTA HIGH COURT.

*Civil Procedure Code (Act VIII. of 1859), s. 26, cl. 4 and 5, and ss. 135, 139, and 141—Amendment of Plaint—Allegations of Facts—Limitation—Act IX. of 1871, s. 19—Personal Equity.*

In 1817 the ancestor of the plaintiffs had obtained from the zemindar a maurasi istemrari lease of a certain portion of his property. In 1837 the entire zemindari was put up to sale for arrears of Government revenue, and was purchased by Government as the highest bidder, who thereupon granted a lease for a term of twenty years to *W*. This revenue sale was never set aside; but in 1842 the Government restored the estate to the Rajah zemindar with all the prior incumbrances, but subject to his confirming the lease to *W*. In 1844 the father of the plaintiffs brought a suit to recover possession of their tenure, but the suit was dismissed by the Principal Sudder Ameen, on the ground that the right to sue had not accrued, and could only arise on the expiration of the lease to *W*. This judgment was reversed by the Sudder Dewany

Adawlat, but was restored and affirmed on appeal by the Judicial Committee. In the meantime, and before the expiry of the lease to *W*, owing to certain fraudulent transactions on the part of *A*, who had got into possession of the estate as the purchaser of the interests of certain mortgagees of the Rajah, the property was again put up to sale for arrears of Government revenue, and was purchased by *M*, a party to the transactions above-mentioned. The Rajah, however, succeeded in getting this sale reversed in 1866, and obtained possession of his estate in 1871. In a suit, instituted on the 23rd October 1873, against the Rajah and certain other parties, to whom he had granted a patni lease, the plaintiffs alleged that the sale of 1837 was set aside by Government as illegal, and that consequently their tenure had revived; that the effect of the Principal Sudder Ameen's decision, confirmed by the Privy Council, was to postpone their right to obtain possession of their tenure, until after the expiration of the lease to *W*; that when that lease expired, the property was in the possession of *M*, of the fraudulent character of whose title they had no knowledge; and that their right to sue in the present case consequently arose only in 1871. The defence was that the plaint disclosed no cause of action; that the cause of action, if any, was barred by the law of limitation; and that the tenure was destroyed by the proceedings connected with the sale in 1837, which was never set aside. The Judge held that the plaint disclosed a cause of action which arose in 1837, and that the suit was consequently barred. He accordingly dismissed the suit without taking any evidence.

On appeal to the High Court, it was admitted on the part of the plaintiffs that the sale of 1837 was never set aside; but it was contended that the restoration of the zemindari to the zemindar, "with all the former incumbrances," gave rise to an equity of a personal character against the Rajah, and those taking under him with notice of the plaintiffs' title, to restore the plaintiffs' tenure, which equity fastened upon him on his obtaining actual possession of the estate; and that therefore the cause of action accrued only in 1871. On the part of the defendants it was objected that the plaintiffs had no right to make a new case in appeal, and inasmuch as the equity which was now sought to be fastened on the zemindar was never raised in the pleadings it could not now be set up. *Held*, that, under ss. 139 and 141 of the Civil Procedure Code, the plaintiffs might be allowed to amend their case in any stage before a final decision: and inasmuch as, if the plaintiffs' case as

so amended were proved, the suit would not be barred, it was necessary for the determination of the question of limitation that the case should be remanded to the lower Court for trial.

*Semble.*—S. 19 of Act IX. of 1871 is applicable only to those cases where the fraud is committed by the party against whom a right is sought to be enforced.

From cl. 4 and 5 of s. 26 of Act VIII. of 1859, it would appear that where a whole estate bearing a name is sued for, the boundaries need not be given.

Per MITTER, J. *Quere.*—Whether, if the plaintiffs' case were established, their claim would not be saved from the operation of the Law of Limitation by s. 29, Act I. of 1845.

*Vide* I. L. R., 2, Calcutta Series, 1, (Markby and Mitter, JJ.) The 10th June, 1876—*Ramdoyal Khan vs. Ajoodhia Ram Khan.*

*Criminal Proceedings—Irregularities—Effect of Waiver by Prisoner—Disqualifying Interest of Judge—Judge giving Evidence.*

The jailor of a district jail being accused by one of the jail clerks of falsifying his accounts and defrauding the Government, the matter was enquired into by the District Magistrate, and the jailor was, by the Magistrate's order, placed on trial before a Bench of Magistrates, consisting of the District Magistrate himself, *L*, the Officiating Superintendent of the Jail, and three other Honorary Magistrates. The prisoner and his pleaders were alleged to have stated before the commencement of the trial on being questioned that they had no objection to the composition of the Bench, but after the charges had been framed, the prisoner's Counsel objected to the Bench as formed. The District Magistrate directed the Government pleader to prosecute, and both the District Magistrate and *L* gave evidence for the prosecution. After the case for the prosecution was closed, two formal charges were drawn up, namely, that the prisoner had debited Government with the price of more oil-seed than he actually purchased, and that he had received payment for certain oil at a higher rate than he credited to Government. The moneys, the receipt of which were the subject of the first charge, were obtained by the prisoner on the strength of certain vouchers which he had induced *L* to sign as correct, and *L* had sanctioned the sale at the rates credited to Government. Upon the prisoner's giving the names of the witnesses he intended to call in his defence, *L* was deputed

by his brother Magistrates to examine some of them who were connected with the jail, in order "to guard against deviation," and the depositions so taken were placed on the record, "to be used by either party, though not themselves as evidence." The prisoner was convicted. On a motion to quash the conviction,—

*Held*, that *L* had a distinct and substantial interest which disqualified him from acting as Judge.

*Held* further, that although a Magistrate is not disqualified from dealing with a case judicially merely because in his character of Magistrate it may have been his duty to initiate the proceedings, yet a Magistrate ought not to act judicially in a case where there is no necessity for his doing so, and where he himself discovered the offence and initiated the prosecution, and where he is one of the principal witnesses for the prosecution.

*Held* further, that the recording the statements of the prisoner's witnesses was irregular.

Criminal proceedings are bad unless they are conducted in the manner prescribed by law, and if they are substantially bad, the defect will not be cured by any waiver or consent of the prisoner.

*Vide* I. L. R., 2, Calc. Series, 23, (Macpherson and Morris, JJ.) The 15th June 1876. *The Queen vs. Bholanath Sen.*

*Limitation Act (IX. of 1871), cls. 122 & 145—Will—Residuary Estate of Moveable and Immoveable Property—Express Trustee—Account—Multifariousness—Jurisdiction—Certificate under Act XX. of 1841—Act XXVII. of 1860, s. 2—Suit by Hindu Widow without Certificate—Claims to Immoveable Property against Executors and Trustees.*

*Held*, that cl. 122 of Act IX. of 1871 applies to a suit for a share of the residue of a testator's moveable property disposed of by his will.

• *Prior v. Hornbiow* (1) followed.

*Held* also, that if a testator appoints persons to be his executors and trustees, and directs them to do certain acts which can only be done by the owners of his residuary estate, the trustees will take that estate, though there be no express devise to them.

*Vide* I. L. R., 2, Calc. Series, 45 (Pontifex, J.) The 13th June and 7th July, 1876. *Treepoorascondery Dosses vs. Debendronath Tagore.*

### Education Necessary to the Study of Law.

"Hume and Adam Smith, Blackstone and others, they say, will not make a man a lawyer, or a politician, or an Engineer, or a Merchant."

"Most true. But they will make a man what is simply essential that he should be, whatever calling he may follow. They will make him a moral and intellectual being."

"It is their office to preserve him from that narrowness of mind, which is apt to be caused by exclusive devotion to mere professional studies; and to arm him against those temptations to swerve from the path of rectitude which will beset him more or less in all walks of life." So said Cameron. While Blackstone is reciting the advantages which a student of law might derive from previous academical education, observed: "If, therefore, the student in our laws hath formed both his sentiments and style, by perusal and imitation of the purest classical writers, among whom the historians and orators will best deserve his regard; if he can reason with precision, and separate argument from fallacy, by the clear simple rules of pure unsophisticated logic; if he can fix his attention, and steadily pursue truth through any the most intricate deduction, by the use of mathematical demonstrations; if he has enlarged his conceptions of nature and art, by a view of the several branches of genuine, experimental philosophy; if he has impressed on his mind the sound maxims of the law of nature, the best and most authentic foundation of human laws; if, lastly, he has contemplated those maxims reduced to a practical system in the laws of imperial Rome; if he has done this or any part of it, (though all may be easily done under able instructors as ever graced any seats of learning) a student thus qualified may enter upon the study of the law with incredible advantage and reputation. And if, at the conclusion, or during the acquisition of these accomplishments, he will afford himself a year or two's further leisure, to lay the foundation of his future library in a solid scientific method, without neglecting too early to attend that practice which it is impossible he should rightly comprehend, he will afterwards proceed with the greatest ease, and will master the most intricate points with an intuitive rapidity and clearness."



## CALCUTTA HIGH COURT.

The 29th June 1877.

## PRESENTS

The Hon'ble E. G. Birch and R. C. Mitter, J.J

BHOGBUN MOHUN BANERJEE, (a Defendant) *Appellant*,*versus*MODDUN MOHUN SINGH (Plaintiff) *Respondent*.*Hindu Law—Inheritance—Daughter—Stridhan.*

According to the Dayabhaga, a daughter's rights over property inherited by her, are not absolute. Her powers of disposition are governed by the ordinary rules applicable to property inherited by females. Stridhan which has once devolved ceases to be ranked as such and is after devolution governed by the ordinary rules and subject to the restrictions imposed upon female takers of property by inheritance.

BIRCH, J.—The plaintiff sues to recover possession of certain lands held by defendants under a mocrurree grant obtained from Shamasoondree in 1272. His contention is that Shamasoondree had no power to grant a mocrurree lease, and that on her death in Bysakh 1277 the pottah ceased to have any force. As the Defendants have continued in possession of the property notwithstanding, the plaintiff seeks to recover possession.

The defendant pleads that Shamasoondree, whom he describes as a childless widowed daughter, inherited the land from her mother Kishoree Dassee in 1241, and being unable to manage the properties, leased them to him at fixed rent in 1272, and asserts his right to retain possession.

Both Courts have given the plaintiff a decree, holding that the disputed property was inherited by Shamasoondree from her mother, but that Shamasoondree had only a limited interest in it and could not grant a mocrurree lease.

In special appeal, it is contended that the Courts are wrong in holding that Shamasoondree had no power to grant a lease in perpetuity, of a property which she had inherited from her mother.

The property was originally the Stridhan of Shamasoondree's mother. When it devolved by inheritance upon Shamasoondree, it ceased to be stridhan, became subject to the ordinary rules which govern the disposition of property acquired by inheritance by females.

A widow's power over an estate inherited from her husband and a mother's power over an estate inherited from her son have been long settled,—and I should have thought that it would be now admitted that a female taker by inheritance has a limited estate—enjoyable by her during her life but which she must not dispose of or encumber to the prejudice of the next takers except for recognized necessity.

But the pleader for the appellant seeks to establish in this case that a daughter succeeding by inheritance to her mother's stridhan property acquires over the property so coming into possession, an absolute estate.

If we could hold that the property which was the mother's stridhan came to the daughter as stridhan, the daughter's power of disposal thereof would be unquestioned. But stridhan which has once devolved ceases to be ranked as such, and is after devolution governed by the ordinary rules and subject to the restrictions imposed upon female takers of property by inheritance [Sel. Rep. vol. i. p. 3. Dayabhaga Chap. XI. Section 1,—57-58.]

The pleader for the appellant relies upon Sections 30 and 31, Chap. XI. Section 2, Dayabhaga, Section 30 treats of the daughter's succession to her father's property on the demise of his widow. Section 3 refers back to Section 56 Chap. XI. Section, and in that verse the Commentator remarks that the word wife "patni" is of general import, and that the rule contained in Section 56 must be considered applicable to the succession of any female by inheritance. The rule being that she is not entitled to make a gift, mortgage or sale of property coming to her by heritage. Section 57 propounds absolute right of a female over her stridhan. Section 58 declares that property devolving by heritage is *not* stridhan, and thus leaves it subject to the restriction imposed by Section 56 on property inherited by females. Property so inherited may be alienated, but it must be for some recognized necessity and with the consent of the next takers.

The contention that the daughter has an absolute instead of a qualified estate in property inherited by her from her mother appears to me to be unsupported by any text of the Dayabhaga. I find no authority for drawing a distinction between property inherited by a daughter from her mother and property inherited from her father.

In page 214 Macnaghten vol. 2, a Bengal case, the question was raised whether a daughter was competent to make a gift of property to a stranger without the consent of her father's brother's sons who were the next takers. The reply was that if the property came to the daughter by succession she had no power to give it without her father's consent. In page 224 of the same volume a childless widowed daughter who had inherited from her father was declared incapable of making a gift of such property without the consent of the next heirs.

In the case of Hurry Dass Dutt *versus* Upoorna Dassee, it was urged a daughter's power over property inherited from her father was more restricted than that of a widow over her husband's estate, but the point was not decided. The authority cited by the Respondent's Pleader from 4 Sel. Rep. 330 Musst Gyan Koonwar was a Behar case governed by the Mitacshara. It is referred to in a case reported in XIV. B. L. R. 235. All the authorities upon the point interpreting the Mitacshara are reviewed in that case and it is held that under the Mitacshara, the estate which a daughter takes in property inherited from her father is only a qualified estate. Her position is declared to be in respect of alienation no higher than that of a widow.

In the case of Musst. Gyan Koonwar a passage from the Viramitrodaya is cited "the power of a daughter over ancestral property is not such as that she should alienate it at pleasure."

In Nobin Chunder Chuckerbutty *versus* Iswar Chunder Chuckerbutty IX. W. R. 505, Sir Barnes Peacock classes female heirs, such as mother's daughter and the like, in the same category as widows and says that the same restrictions as to alienation are applicable to them.

In page 21 Mr. Macnaghten says the daughter's interest in her inheritance is not absolute. This remark appears to be of general application, and not to refer to any particular part of the country.

The text of the Mitacshara is to the effect that property taken by inheritance from her father by a daughter is stridhan and that she has absolute control over it. But a series of decisions of this Court culminating in that reported in XIV. B. L. R. 238 have settled the law on this side of India where the Mitacshara prevails to be that a daughter takes only a qualified interest in such property. The text of the Dayabhaga expressly lays down that what is in-

herited by a woman is not *stridhan* and the cases I have mentioned relating to Bengal where the *Dayabhaga* is in force are against the contention that a daughter's rights over property inherited, are higher than those of a widow. Whether the property comes to the daughter from her father or her mother makes no difference. In neither case is it *stridhan*, and therefore its disposition is governed by the ordinary rules applicable to property inherited by females.

Shamasoondree had no power to make this *mocurraree* grant in favour of the defendants, and the plaintiff as heir is entitled to obtain possession of the property.

The special appeal is dismissed with costs.

MR. JUSTICE MITTER.—In this case the Courts below have found that the properties in dispute were *stridhan* of Kishoree who received them in gift from her husband. Although the finding has been questioned in Special Appeal as regards one of the properties, but I do not think that we can interfere with it. There is evidence to support it and no error of law has been established to justify our interference.

The Lower Courts have also found that the plaintiff is the heir of the former owner, whether that former owner be taken to be Kishoree or her husband. In Special Appeal no exception has been taken to this, and we are therefore relieved from considering this question.

The only point that requires our consideration is whether Shamasoondry having inherited to this *stridhan* property of her mother had power to alienate it.

It has been now settled beyond the possibility of a doubt that a female whether widow, daughter's mother, grandmother or great-grandmother succeeding to properties left by a *man* by right of inheritance has not the power of alienation except under certain especial circumstances. The question we have to decide is whether the same rule applies to the inheritance of women in regard to *stridhan* property.

That *stridhan* inherited by a woman does not become her *stridhan* is clear. See *Dayakrama Sangraha* Chap. 11 Section 11 para. 12, and Section III. para. 6, *Macnaghten's Hindu Law* p. 38, 1 *Sel. Rep.* p. 3., 2 *Bengal Report* p. 144, 3 *Madras High Court Rep.* But it has been remarked by Mr. Macnaghten in the passage referred to above, that upon the death of the woman who inherits

to a *stridhan* property, it passes to her heirs meaning evidently to persons, who would inherit to her properties other than *stridhan*. With the greatest deference to that learned author it seems to me that this remark is founded upon some misconception of the provisions of the Hindu Law upon the subject. According to Hindu Law a woman can have only two kinds of properties, viz., (1) *stridhan* and (2) inherited properties. As to the first class, there is an exhaustive enumeration of the heirs, and as regards properties inherited from a man it goes after her death to the heirs of the last owner, and it seems to me that the same rule holds good also as regards *stridhan* property inherited by a woman, i. e., upon her death it goes to the heirs of the last owner. Dayakrama Sangraha Chap. 11, Sec. 3 para. 6, already referred to clearly establishes this proposition.

It seems to me that the same rule is laid down in Dayabhaga Chap. XI. Section 11 para. 3. The Chapter in question, it is true, mainly deals with rules of succession to properties left by a deceased male owner but the paragraph referred to above, appears to me to lay down a rule applicable generally to succession by women, whether to the properties of a man or to *stridhan* of a woman. If it were not so there would be no provision in Dayabhaga relating to succession to a property inherited by a woman from a female ancestress who held it as *stridhan*. I do not think that this is probable. Having regard to this circumstance and having regard to the language of the paragraph in question which is very general, it seems to me that the rule there laid down is also applicable to *stridhan* property inherited by a woman.

Further it seems to me also clear that the rule referred to in the aforesaid paragraph is that laid down in para. 56 of Section 1 Chap. XI. It has been said that the whole of the latter rule is not intended to be extended to a woman's succession by inheritance generally but that part of it which provides that after the death of a female heiress the heirs of the last owner take the inheritance.

If we adopt this limited construction we must then come to the conclusion that according to Dayabhaga there is no restriction to the powers of alienation of women succeeding by inheritance to the properties of a deceased male owner except in the case of a widow. It is too late now to contend for such a construction of the law as this. Repeated decisions have settled the question beyond the possibility of a doubt. It seems to me therefore clear that by

the paragraph in question what is rendered applicable "generally to the case of a woman's succession by inheritance" is the whole of the rule laid down in para. 56 of Section 1 of Chap. XI. of Daya-

The result therefore is that Shamasoondree in this case succeeding to her mother's *stridhan* had no power of alienating the properties inherited by her, except for special purposes sanctioned by the Hindu Law. The Special Appeal therefore must be dismissed with costs.

## DIFFERENT KINDS OF MORTGAGES.

[ *In continuation of p. 227.* ]

### EQUITABLE MORTGAGE.\*

I have said that equitable mortgages form a distinct group in the English law of securities. It was, however, very slowly that they found a place in that system, and their ultimate recognition is solely due to the action of the Court of Chancery. The Statute of Frauds provides that all agreements relating to any interest in land must be reduced to writing, and equitable mortgages were supposed to trench upon the statute. They were, however, admitted by the Court of Chancery by a somewhat refined distinction between executed and executory contracts. Equitable mortgages were first introduced by Lord Thurlow, but Lord Eldon and Sir William Grant were both averse to any extension of the doctrine. It was at first attempted to confine the rule only to those cases in which the delivery was made with the object of executing an *immediate* pledge; but the doctrine has since been overruled, and equitable mortgages have maintained their ground in English law, notwithstanding the jealousy with which their introduction was at first regarded. We have here an instance, by no means exceptional, in which the law has been compelled to yield to the exigencies of commerce. As observed by Lord Abinger,—“In commercial transactions it may be frequently necessary to raise money on a sudden, before an opportunity can be afforded of investigating the title-deeds, and preparing the mortgage. Expediency, therefore, as well as necessity, has contributed to establish the general doctrine, although it may not altogether be in consistency with the statute.” (*Keys v. Williams*, 3 Y. & C., 61.)

\* *Vide* Tagore Law Lectures 1875-76, Lecture III by R.B. Ghose, p. 75 to 87.

The objections, however, which apply to equitable mortgages in England, do not apply to them in India. The doctrine, therefore, has been firmly established in this country. A somewhat bold attempt was made to question it in a recent case in the Bombay High Court, but, as might be expected, it was unsuccessful. (7 Bom. High Court Rep., 45, Original Side.)

I have already said that the expression "equitable mortgage" is not properly applicable to a transaction between natives of this country, and if I use it, it is only out of deference to long continued usage. The objection is not a mere verbal one. The case of *Luchmiputty* and *Seth Varden Sam* shows the danger of extending technical English expressions to transactions which have only a partial resemblance to the things denoted by such expressions. In the Madras case, the defendants insisted in their defence upon the doctrine of the English Court of Chancery, that they were protected from the claims of the plaintiff as purchasers for value without notice. Now if you examine the real nature of an equitable mortgage in the English law, and that of a mortgage by delivery of title-deeds in India, you will find a very remarkable distinction. In the English law, an equitable mortgage is only an agreement to mortgage owing to the incapacity of persons subject to the English law to convey otherwise than by deed. In this country, however, there being no such restriction, a delivery of title-deeds of itself operates as a conveyance. Now, as I have already explained to you, a contract does not create any real right, although English Courts of Equity, proceeding upon a very sensible ground, treat the contract as a conveyance as against purchasers with notice of the agreement. In an English Court of Equity, therefore, a purchase for value without notice would be a perfectly good defence to a suit by an equitable mortgagee, but in this country it would not furnish any answer, for the so-called equitable mortgage not being in any sense a *contract* for a mortgage, the Indian equitable mortgagee has a right superior to that of any person claiming under a title subsequently derived from the mortgagor. It seems to me that the defence in the Madras case, to which I have referred, was suggested by the use of the unhappy expression "equitable mortgage" to denote the nature of the right of the plaintiff in that case. I think I have said enough to put you on your guard against the misconceptions, which an inaccurate use of

technical terms, borrowed from an extremely artificial foreign system, seldom fails to occasion. (See, however, *Bunshedhur v. Heera Lall*, 1 All., 166.)

I have already stated that the deposit of title-deeds is sometimes accompanied by a memorandum in writing, setting forth the nature of the transaction. Even in this case, however, the memorandum is not the contract between the parties; but the contract is implied by the Court from the deposit of the title-deeds and the advance of the money on such deposit. In the case of a mortgage in writing, if the instrument is unregistered, the mortgagee cannot, generally speaking, enforce his security against the land, because the contract is evidenced by the instrument itself, and that being inadmissible in evidence, no other evidence is allowed to be given. In the case, however, of a mortgage by deposit of title-deeds, although there may be a memorandum, the memorandum is not looked upon as the instrument creating the mortgage, but, as observed by the Court in *Kedarnath Dutt and another v. Sham Lall Khettry* (20 W. R., p. 150) "the mortgage is created by the agreement which is evidenced by the loan and the deposit of the title-deeds. The mortgagee may, therefore, rely upon the parol agreement, which is implied by the deposit of the title-deeds. It must, however, be remembered that the mortgage would not be a mortgage in writing, but a parol mortgage, and therefore subject to all the incidents of a parol mortgage. The distinction is an important one, and requires to be illustrated by one or two recent cases in which the question has been raised. In the case of *Kedarnath Dutt and another v. Sham Lall Khettry*, to which I have already alluded, the facts were shortly these. The plaintiff, who asked the Court to declare his rights as an equitable mortgagee on certain premises, had advanced to Woomachurn Banerjee a certain sum of money on the deposit of the title-deeds of certain property, belonging to the borrower. Woomachurn also executed a promissory note, whereby he promised to pay to "Sham Lall Khettry or order the sum of Rs. 1,200, with interest at the rate of 24 per cent. per annum, for value received in cash." There was an endorsement on the promissory note in these words:—"For the repayment of the loan of Rs. 1,200, and the interest due thereon of the within note-of-hand, I hereby deposit with Baboo Sham Lall Khettry, as a collateral security by way of equitable mortgage, title-deeds of my



property situate at No. 11 in Fucker Chand Mitter's Street at Mirzapore in Calcutta." "Woomachurn Banerjee." There was some question as to whether the transaction was completed when the promissory note was given, but the Appeal Court thought that the question whether there was a complete equitable mortgage before the promissory note was given, or whether that was the completion of the transaction, was not material. It seems that after the deposit of the title-deeds the property was sold under an execution against Woomachurn and purchased by the defendants Kedernath Dutt and Madhub Chunder Bose. These defendants resisted the plaintiff's suit on the ground that the mortgage was created by an express agreement which was reduced to writing, and, as the endorsement was not registered, the plaintiff could not enforce any claim against the land which, as I have already said, had intermediately passed to them under an execution against Woomachurn Banerjee. The objection, however, was overruled. Sir Richard Couch in giving the judgment of the Court observed:—"The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created and would come within section 17 of the Registration Act. But it was not a writing of that character. As I have said, the equitable mortgage was created by the agreement which was evidenced by the loan and the deposit of the title-deeds. The promissory note, whether given either at the same time or some hours afterwards in pursuance of the understanding between the parties, was evidence of the terms upon which the loan was made, viz., that the interest should be at the rate of 24 per cent."

"But as regards the contract between the parties, if there had been no memorandum at all on the promissory note, there would have been a complete equitable mortgage. When we consider what the memorandum is, we find it is not the contract for the mortgage, not the agreement to give a mortgage for the Rs. 1,200, but nothing

more than a statement by Woomachurn Banerjee of the fact from which the agreement is inferred. It is an admission by him that he had deposited the deeds upon the advance of the money for which the promissory note was given. It is not by the memorandum that the Court takes the agreement for the mortgage to be proved, but by the deposit of the deeds. This is no more than a piece of evidence showing the fact of the deposit which might be proved by any other evidence. The memorandum need not have been produced.

"On the ground, therefore, that this was not a writing which the parties had made as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred, I think it does not come within the description of documents in the 17th section of the Registration Act." (20 W. R., 150.)

There is another case to be found in the books (7 Bombay, 50) which is somewhat stronger. In that case the plaintiff had agreed to lend a certain sum of money to Devji Keshavji on a deposit of the title-deeds of certain property belonging to the debtor. The title-deeds having been deposited, the plaintiff continued to advance certain sums of money from time to time till the whole sum advanced amounted to that which the plaintiff had originally agreed to advance. On the 13th of June 1865, after the Registration Act of 1864 had come into force, and when the last advance was made, a Guzrati document was executed by the debtor in which, after stating the amount which had been advanced from time to time by the plaintiff, the debtor proceeded to say,—“According to these particulars I have received or borrowed from you at interest Rs. 25,000 in cash and currency notes. On account of the same (there are mortgaged) at your place my piece of land at Naigáni, namely, a garden with a building (or) a bungalow, which (land) is registered under No. 36 in the Collector's books, and the building or dwelling-house built on the said piece of land that is registered under No. 9 in the books of the house-assessment Collector. All the deeds and other 'vouchers' relating to the said land having been left in mortgage at your place, Rs. 25,000, namely, twenty-five thousand, have been received (or borrowed) at interest thereon for an unlimited time.”

This document was not registered, and the question arose whether the writing being inadmissible in evidence, the plaintiff

could enforce his rights as mortgagee. The question was answered in the affirmative, and Mr. Justice Bayley in giving judgment is reported to have said :—" I consider that the contract for a security on the land was created when the loan was applied for and agreed to, and the deeds were handed over to Karsandas ; and that the receipt then and those subsequently given did not, nor did the Guzrati document of the 13th of June 1865, on which day Rs. 25, the last instalment of the Rs. 25,000, was advanced, create or declare any right or interest within the meaning of the Registration Acts. The rights of the parties, be they legal or be they equitable, had already been created and perfected on the 31st of October 1864, and it required no memorandum or writing to render such rights valid, nor in fact was there evidence that any such document, or any deed or writing, was on the 31st of October 1864 contemplated by the parties. Suppose the receipts and the instrument of the 13th of June 1865 had never existed, the lien or charge on the property would still, in my opinion, have been perfect and valid. The fact of such informal native document being subsequently given and executed after the transaction had been completed, cannot, I think, in any way be held to affect the validity of that which Sir Lawrence Peel, in the Calcutta case, calls *a perfected contract of pledge*, or, to borrow the words of Lord Kingsdown, was a '*contract which created between the parties a lien on the land.*'

"In general, no doubt, where a contract has been reduced into writing by the parties, the writing is the best evidence of it, and must be produced. But it is not in every case necessary, where the matter to be proved has been committed to writing, that the writing should be produced. If, for instance, the narrative of an extrinsic fact has been committed to writing, it may yet be proved by parol evidence. Upon this principle a receipt for money given on unstamped paper will not exclude parol evidence of the payment, and the paper on which it is written may be produced not as evidence of itself, but as a material memorandum which a witness who saw it given may refer to, and give parol evidence of the fact of payment. (*Rambert v. Cohen* ; 1 Taylor on evidence, p. 412, 5th ed.) So a verbal demand of goods is admissible in trover, though a demand in writing was made at the same time :—*Smith v. Young*. The fact, too, of birth, baptism, marriage, death, or burial may be proved by parol testimony, though a narrative or memorandum

of these events may have been entered in registers which the law requires to be kept, for the existence or contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of that fact, which may furnish a satisfactory and convenient mode of proof, but cannot exclude other evidence, though its non-production may afford grounds for scrutinising such evidence with more than ordinary care." (7 Bombay, 62-63.)

These cases, therefore, show that where the conduct of the parties is such as to raise the inference of a mortgage, such conduct may be relied upon, although there may be a statement of fact in writing from which the same inference may be made. If, for instance, I borrow money on the deposit of title-deeds, I may state the fact of deposit in writing, but the writing is not the only evidence of such deposit, and it may be proved by other means. If, however, a formal document is executed, I apprehend such document must be taken to be the only evidence of the transaction, although there are certain expressions in the judgment of the Bombay Court which might perhaps lead to the inference that even in such a case the parties might, so to speak, go behind the writing and rely upon the deposit coupled with the advance. If such was really the meaning of Mr. Justice Bayley, I venture to say, with great deference, that the dictum cannot be supported to that extent. The distinction is clear between a writing containing a statement of fact from which the Court may infer a contract, and a document in which the contract itself is reduced to writing.

From what I have already said it is clear that a memorandum of the description mentioned above is not a document the registration of which is compulsory. This was substantially decided in both the cases I have mentioned. I have gone at some length into the subject because I think the nature of what is called an equitable mortgage cannot be properly understood without a careful study of the distinction between mortgages of this class, and what I have called express conventional mortgages; and this distinction is very clearly brought out in the cases in which questions of the admissibility of the memorandum, which sometimes accompanies the deposit, have been raised. I have already said that an equitable mortgage, although it may be accompanied by writing, is still only a parol mortgage. It is, therefore, liable to all the disadvantages

imposed by the Registration Act on parol transactions. If the mortgage is not followed or accompanied by possession, and equitable mortgages are very seldom followed by delivery of possession, it is liable to be postponed to subsequent incumbrances which may be registered. A somewhat difficult question may perhaps arise if the memorandum is registered, but that is not generally practicable owing to the provisions of the Registration Act; Section 21 of which says,—“No document, not testamentary, relating to immoveable property, shall be accepted for registration unless it contains a description of such property sufficient to identify the same.” Even if the memorandum accompanying an equitable mortgage be registered, I should venture to think that the mortgagee would not be in the same position as one who holds a registered express conventional mortgage.

## MADRAS HIGH COURT.

*The 18th July 1876.*

PRESENT :

Sir W. Morgan, C. J. and Mr. Justice Innes

REG *vs.* ARUNA CHELLUM\* AND 2 OTHERS.†

*Indian Penal Code, S 372.*

To constitute an offence under Section 372 of the Indian Penal Code it is not necessary that there should have been a disposal tantamount to a transfer of possession or control over the minor's person.

THIS was an appeal against the sentences of the Session Court of Madura in Calendar Case No. 26 of 1876. The 1st prisoner, Arunachellam, was charged, under Section 372 of the Indian Penal Code‡, with having disposed of his daughter under the age

\* *Vide* I. L. R., 1 Madr. 164.

† Criminal Appeal No. 198 of 1876.

‡ Section 372 of the Indian Penal Code is as follows :—“Whoever sells, lets to hire, or otherwise disposes of any minor under the age of 16 years, with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

of 16 years, knowing it to be likely that she would be employed for the purpose of prostitution, and the 2nd and 3rd prisoners were charged with abetting the commission of the said offence. The Assessors found the prisoners guilty of the offences charged and the Session Judge, concurring with the Assessors, sentenced the 1st prisoner to six hours' simple imprisonment and to pay a fine of fifty-one Rupees, the 2nd and 3rd prisoners to the same imprisonment and to fines of five Rupees and one Rupee respectively.

The Calender of the Session Judge, P. P. Hutchins, gives the following statement of facts and reasons for the sentences passed :—

"In this case 1st prisoner presented an application for the enrolment of his daughter as a dancing girl of the great pagoda at Madura. He stated her age to be 13, and it has throughout been admitted that she is under 16. She attained puberty a month or two after her enrolment. Her father is the servant of a dancing girl, the 2nd prisoner, who has been teaching the minor dancing for some 5 years. Her father and herself lived in 2nd prisoner's house and after the ceremony returned there. The evidence shows that 2nd prisoner brought the girl to the pagoda; probably she dressed her also, but that is not admitted, and I wish only to state admitted facts; that both 1st and 2nd prisoners were present when the Bottu was tied and other ceremonies of the dedication performed; that 3rd prisoner as Battar of the temple was the person who actually tied the Bottu, which is equivalent to the Tali of an ordinary marriage, and denotes that the Dasi is wedded to the idol. There is the usual evidence that dancing girls live by prostitution, though occasionally being kept by the same man for a year or more; but the fact being admitted, it was not necessary to multiply witnesses upon this point.

I took a special verdict from the assessors. It runs as follows :—

"We find that Kistnammál is under 16; that 1st prisoner, her father, got her made into a Dasi by the tying of the Bottu; that Dásis universally get their living by prostitution; that her father knew she was likely to be employed for prostitution; that she was likely to become a prostitute before she attained the age of 16; and that her father knew that."

"We also find that 2nd prisoner abetted the above acts, and that 3rd prisoner also abetted them."

In that verdict I entirely concur.

As to the law, I have held in a former case that there must have been a disposal tantamount to a transfer of possession or control over the minor's person to constitute an offence under this section, but the Bombay High Court have held the contrary\*, and I consider myself bound by their decision on any points of statutory construction not inconsistent with the decision of the Madras High Court. I have, therefore, convicted, but my former judgment has doubtless been accepted by these people as declaratory of the law, and has led them to believe their acts innocent. The case, therefore, only calls for a nominal sentence."

The prisoners appealed to the High Court on the ground that the conviction was contrary to law.

The appeal came on for hearing on the 18th of July 1876, when Mr. Tarrant appeared for the prisoners and contended that the conviction was wrong, as a disposal tantamount to a transfer of possession or control over the minor's person should be shown in order, constitute an offence under Section 272.

The High Court affirmed the convictions.

#### CALCUTTA HIGH COURT.

*The 30th July 1877.*

PRESENT :

The Hon'ble W Markby and the Hon'ble H J Priusep, *Judges.*

PUDDO LOCHUN PANIA, *Petitioner.*

*Sec 523 and s. 518 of the Criminal Procedure.*

In a case under Chapter 39 of the Criminal Procedure Code, the Magistrate is bound to base his order upon the finding of the Jury. An order under Section 518 should be passed only under special and emergent circumstances calling for immediate action.

On complaint to the Sub-divisional officer of Attea that a certain public road had been unlawfully closed, the matter was referred for enquiry by a Sub-Deputy Magistrate on whose report the Sub-divisional Magistrate on the 19th December passed the following order.

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\* 6 Bom H. C. Reps, C. C. 60.

"The road shall be immediately repaired by the accused and the house removed. I am quite satisfied from the report of the Sub-Deputy Magistrate that the case calls for action under Section 618 C. O. P."

The opposite party called "the accused" then appeared and applied for a jury under Section 523 and five persons were accordingly appointed.

On receipt of their report, the Sub-divisional officer on the 7th April referred the matter for the orders of the Magistrate of the District who returned the case, remarking that the Sub-divisional Magistrate had equal powers with himself to deal with it.

The Sub-divisional Magistrate thereupon passed the following order: "As the Panchaet substantially acknowledges that the road is a public one, though inconvenient to the obstructor's privacy, I hereby order it to remain open."

Application is now made to us to set aside this order as contrary to law inasmuch as it does not give effect to the finding of the Jury.

We have heard the report made by the members of the Jury who were not unanimous and we have no doubt, that the opinion of the majority is not in accordance with the final order passed by the Sub-divisional officer and that he did not really consider it to be so is clear from his report to the District Magistrate already mentioned, for he states, "the Jury decided that the obstruction was justified and was not a public obstruction," and again, "I feel it necessary to take this action as if the present Jury which seems neither partial nor intelligent is maintained, any village road may be blocked up by an influential man who wants to make a house."

We find it difficult to understand how the Sub-divisional Magistrate having thus written on 7th April can on the 19th of the same month state that "the Panchaet substantially acknowledges that the road is a public one though inconvenient to the obstructor's privacy." It seems to us that he was influenced by the report of the Sub-Deputy Magistrate and by what he had himself seen of the road in dispute and had determined in spite of the law not to give effect to the opinion of the majority of the Jury because it was not in accordance with what he deemed the just decision of the matter.



*This it is quite clear the Magistrate was not competent to do. He is bound to base his order upon the finding of the Jury in a case under Chapter 39, for the Jury are specially appointed to decide whether the order of the Magistrate is a reasonable and proper order and the Magistrate obviously cannot properly adhere to his former order when a Jury has decided that it is not reasonable or proper, except possibly in certain cases coming under Section 528.*

But in the present case we are unable to do otherwise than set aside all the proceedings taken. The original order was passed under Section 518 and was an illegal order, because there is nothing in the report of the Sub-Deputy Magistrate on which the Magistrate relies, to justify an order under that Section which can be passed only under special and emergent circumstances calling for immediate action. No further order was passed under Section 521 nor do we find that any order was expressly referred to the Jury as is required by Section 523 for them to try whether it was a reasonable or proper order.

Lastly, we find the terms of the report of the majority of the Jury to be so ambiguous, probably because they had not tried the proper issue, whether the order was a reasonable or proper one, because it had never been referred to them, that we are unable to decide what was the real purport of their finding, though no doubt there is some indication of a tendency to find that it was a road kept up only by private arrangement between the parties concerned. We are however of opinion that the finding is not so clear or precise that its purport can be unmistakably determined and given effect to, and as we hold further that the entire proceedings are bad, we quash them ab initio. If the present Magistrate should still think it necessary to settle this matter, he should regularly proceed under Section 521.

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## BOMBAY HIGH COURT.

*The 24th August 1876.*

PRESENT:

Mr. Justice Melvill and Mr. Justice Nanabhai Haridas.

REG v. GAJI KOM RANU.\*

*Criminal Procedure Code (Act X, of 1872), Sections 197, 472 and 473—Contempt of Court—False evidence—Commitment—Sentence.*

Giving false evidence is "an offence committed in contempt of the authority" of a Court within the meaning of Section 473, of Act X of 1872. *Reg. v. Navranbeg* (10 Bom. H. C. Rep. 73) and the ruling in 7 Mad. H. C. Rep., App. XVII, followed. *Queen v. Kultaran Singh*, I. L. R., 1 All. 129 and *Queen v. Jagut Mull*, *ibid*, 162, dissented from.\*

Where the accused was by a Magistrate, First Class, committed for trial by the Sessions Court on a charge of having given false evidence in a judicial proceeding before the Sessions Judge, there being no Assistant Sessions Judge or Joint Sessions Judge.

*Held* that the commitment could not be quashed, there being no error in law and the case must, therefore, be transferred for trial to another Court of Session.

In such a case as the above the better course would be for the Magistrate to try the case himself, and, if he is incompetent to pass a sufficient sentence, for the Sessions Judge to refer the case to the High Court for enhancement of sentence.

THE accused Gaji Kom Ranu was charged with having given false evidence in a judicial proceeding before A. Bosanquet, Sessions Judge of Ahmednagar. The preliminary enquiry was made by T. S. Hamilton, Magistrate, First Class, who committed her for trial before the same Sessions Judge. Mr. Bosanquet, therefore, submitted the case for the orders of the High Court, as he had no jurisdiction to try it under Section 473 of the Criminal Procedure Code, the offence having been committed in his own Court.

MELVILL, J.:—The Sessions Judge of Ahmednagar being debarred by Section 473 of the Code of Criminal Procedure from trying an offence committed in contempt of his own authority, the

\* *Vide* I. L. R.; 1 Bombay 311.

† See also the case of *Sufatoolah* (22 W. R. Cr. 49) in which the Calcutta High Court took the opposite view to that taken in the present case.

case of the *Queen v. Gaji*, wife of Ranu, is under the provisions of Section 64 of the Code, ordered to be transferred for trial to the Sessions Court of Poona.

If it were not for the peculiar wording of Section 473 of the Code of Criminal Procedure, we should have hesitated to accept the broad proposition laid down in *The Queen v. Navranbeg†* that the offence of giving false evidence is to be regarded as a contempt of Court. But (notwithstanding some rulings of the Allahabad Court to the contrary)|| we agree with the Madras High Court,§ that the Legislature has, by most inapt words, extended the prohibition contained in Section 473 to the offence of giving false evidence, and that consequently a Sessions Judge cannot try any person for such an offence committed before himself.

It follows that, in cases like the present, in which a Magistrate commits a person for trial before the Sessions Court for the offence of giving false evidence before the Sessions Judge, the case cannot be tried by the Sessions Court, unless there be an Assistant Sessions Judge or a Joint Sessions Judge to whom the case can be referred. In Ahmednager there is no such officer. The commitment cannot be quashed, as there is no error in law (Criminal Procedure Code, Section 197). The only remedy, therefore, is to order the transfer of the case for trial to another Court of Session.

It is obvious that such a proceeding involves much inconvenience and hardship to witnesses. It would be better that, in all such cases arising in districts in which there is no Assistant or Joint Sessions Judge, the Magistrate should try the case himself, and that if the sentence which the Magistrate is competent to pass is insufficient, the Sessions Judge should refer the case to the High Court for enhancement of sentence.

It is to be hoped that the attention of the Legislature will be directed to the defect in the law which creates this difficulty, and which appears to have been the result of an oversight. When Section 172 of Act XXV of 1861 was reproduced *verbatim* in Section 472 of the Code of Criminal Procedure, it was, no doubt, the intention of the Legislature that the new section should have

† 10 Bom. H. C. Rep. 73.

‡ *Queen v. Kullaran Singh*, 7 L. R., 1 All. 129 and *Queen v. Jugat Mull*, *ibid* 162.

§ See Proceedings, 24th March 1873, 7 Mad. H. C. Rep., Appx. XVII.

the same effect as the old, and that a Court of Session should be able to charge a person for giving false evidence before itself. But this intention has been defeated by the change which has been made in the Schedule of the Code, rendering the offence of giving false evidence triable by a Magistrate of the First Class, and no longer "by the Court of Session exclusively."

*Note*—It was held in *Reg. v. Gulabdas* (11 Bom. H. C. Rep. 98) that an offence committed in contempt of the Session Judge's authority was cognizable by the Assistant Sessions Judge.

## MADRAS HIGH COURT.

*The 5th December 1876.*

PRESENT :

Sir W. Morgan, C. J. and Mr. Justice Innes.

REG *v.* SAMIA KAUNDAN.\*

*Indian Penal Code, Sections 363 and 116—Abetment of Kidnapping.*

Accused was convicted by the Magistrate of abetting the kidnapping of a minor. Accused knowing that the minor had left home without the consent of his parents, and at the instigation of one Komaren, the actual kidnapper, undertook to convey the minor to Kandy in Ceylon and was arrested on the way thither. The Sessions Judge reversed the conviction on the ground that there was no concert between the accused and Komaren previous to the completion of the kidnapping by the latter. *Held* by the High Court, that so long as the process of taking the minor out of the keeping of his lawful guardian continued, the offence of kidnapping might be abetted, and that in the present case the conviction should be of an offence punishable under Sections 363 and 116 of the Penal Code.

Upon reading the records in Appeal Case No. 14 before the Court of Session of Salem, Counsel not appearing, the High Court made the following

**RULING.**—In this case the Deputy Magistrate convicted the accused of abetting the kidnapping from lawful guardianship of a lad of 11 or 12 years of age and sentenced him under Sections 363 and 109 of the Indian Penal Code to be rigorously imprisoned for nine months.

The actual kidnapping is stated to have been committed by one Komaren, a brother-in-law of the accused.

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\* *Vide* L. L. R., 1 Madras p. 178.

The accused knowing that the lad had left home without the consent of his parents, and at the instigation of Komaren, undertook to convey the lad and another boy to Kandy in Ceylon, and had proceeded on the way as far as Trichinopoly, when he was arrested.

On appeal the Sessions Judge has reversed the conviction of abetting the offence of kidnapping on the ground that there was no concert between the accused and Komaren previous to the completion of the kidnapping by the latter.

The High Court are of opinion that so long as the process of taking the minor out of the keeping of his lawful guardian continued, the offence of kidnapping might be abetted.

The evidence however shows that the kind of kidnapping attempted was kidnapping from British India, and, as the attempt failed, the conviction should be of an offence punishable under Sections 363 and 116 (not 109).

The order of the Sessions Judge reversing the conviction is annulled. The accused Samia Kaundan is convicted of an offence punishable under Sections 363 and 116 of the Penal Code, and is sentenced to be rigorously imprisoned for six months.

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#### CALCUTTA HIGH COURT.

*The 12th July 1877.*

#### PRESENT:

The Hon'ble W. Ainslie and W. F. McDonell V. C.

#### *Confession to a Police Officer.*

'A Police Officer' in Section 25 of the Evidence Act, means any Police Officer whether in any way connected with the investigation of the case or not. Section 25 excludes confessions made to a Police Officer under any circumstances.

We think that the conviction in the present case must be set aside. That conviction is substantially based upon the statement made by the accused to one Mosun Ali, the Sub-Inspector of Thanah Abidabad.

The Judge says that "it is perfectly true that Mosun Ali is a Police Officer, but it appears from his evidence that he had come to Sylhet to give evidence in another case, that he was in no way connected with the investigation of this case, and that the appellant came to him as to a personal friend and asked his evidence of his own accord."

The 25th-Section of the Evidence Act says, without limitation or qualification, that "no confession made to a Police Officer shall be proved as against a person accused of any offence."

It has been contended that this section is to be read as if it ran "no confession made to a Police Officer investigating the case;" in the present instance the Police Officer to whom the confession was made did not even belong to the same Police Division; that he was only casually brought into contact with the accused, and that therefore this Section cannot apply. It appears to me that section 26 shews that this is not the true construction of the 25th Section. That Section deals with confession made in the presence of a Police Officer who has the custody of an accused person, that is, of a Police Officer who is concerned more or less in the investigation of the case; and those confessions are absolutely excluded whether made to a Police Officer or to any other person unless made in the immediate presence of a Magistrate. This Section would necessarily include the 25th Section if it is to be read as suggested and thus make it useless. But this could not be intended and, therefore, it is clear that the proper construction is one that excludes confessions to a Police Officer under any circumstances or to any one else while the person making it is in a position to be influenced by a Police Officer unless the free and voluntary nature of the confession is secured by its being made in the immediate presence of a Magistrate, in which case the confessing person has an opportunity of making a statement uncontrolled by any fear of the Police.

In the case reported in 1 Indian Law Reports, page 207, the learned Chief Justice expresses the opinion that the term "Police Officer" should be read not in a strict technical sense but according to its more comprehensive and popular meaning. In that case although it was admitted that the confession was made to Mr. Lambert at a time when he was not acting as a Police Officer but as a Magistrate and that there was no danger that a gentleman in Mr. Lambert's position would extort a confession, the Court considered itself bound to give the accused the benefit of the literal construction of the words of Section 25. It seems to me that we could not venture to adopt the view of the law contended for by the learned Junior Government Pleader without opening the door to perversion of the intentions of the Legislature.

The Petitioner will be discharged from bail.

## PRIVY COUNCIL.

*The 17th and 18th April 1877.*

## PRESENT :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith and  
Sir Robert P. Collier.

**BARON FORESTER AND WIFE (Widow of D. O. DYCE )** *Plaintiffs,*  
**SOMBRE), and another** ... }  
and  
**SECRETARY OF STATE FOR INDIA IN COUNCIL** ... *Defendant.*

## AND CROSS APPEAL.

On appeal from the Chief Court of the Punjab.

*Interest on Costs cannot be given in execution unless decreed.*

Where an order of the Judicial Committee is silent as to interest upon the costs decreed, the Judge of the lower Court which has to execute the decree has no power to direct payment of those costs with interest.

The existing practice of the Indian Courts not to give in execution interest on costs unless specially decreed, or unless submission is made by the parties to the discretion of the Court, approved.

**SIR JAMES W. COLVILLE.**—(In delivering the judgment of their Lordships said :—) It is not necessary for their Lordships to consider from what other date interest should be calculated, because they are of opinion that the Chief Court of the *Punjab* is right in its conclusion; that where the Order in Council is silent as to interest upon the costs decreed, the Judge of the Indian Court which has to execute the decree has no power to direct payment of those costs with interest.

The learned counsel for the Appellants relied upon what they said had been the course of practice in *India*. In determining what is the existing practice in *India*, their Lordships think they ought first to consider what are the statutory provisions which govern the present procedure of the Courts in *India*. Those which are material to the present question are to be found in the 10th and 11th sections of Act XXIII. of 1861. The words of the 10th section are, "When the suit is for a sum of money due to the Plaintiff, the Court may, in the decree, order interest at such rate as the Court may think proper to be paid on the principal sum, adjudged from the date of suit to the date of the decree, in addition to any interest

adjudged on such principal sum for any period prior to the date of suit, with further interest on the aggregate sum so adjudged, and on the costs of the suit from the date of the decree to the date of payment." This clause seems to give the Courts a discretionary power to allow interest on costs, rather than to make it imperative upon them to do so. The learned counsel for the Plaintiffs, however, relied on certain decisions of the High Court of *Bengal*, which they said established that an order for costs necessarily implied that the party in whose favour they were decreed might take out execution for them, with interest from the date of the decree to the date of payment. It appears, however, that the more recent and authoritative decisions upon the 11th section of Act XXIII. of 1861 are the other way. It is sufficient to mention the case reported in the 6th *Weekly Reporter* at page 109, which was a decision of the Full Bench of the High Court of *Bengal*; and that before Mr. Justice *Bittleston*, which is reported in the 3rd *Madras High Court Reports*, page 421. Those cases seem to have established as to decrees of Indian Courts that the Judges of the subordinate Courts executing those decrees have no right to allow interest unless the decree which is to be executed has specifically directed the allowance of that interest. It was said that these cases or some of them related to the principal moneys decreed, or to mesne profits; but so far from there being any authority in favour of a distinction between these and costs, the case of *Rodger v. The Comptoir d'Escompte de Paris*\* is an authority for the proposition that a claim for interest on costs in that respect is less favoured than a claim for interest on the principal money decreed. Since the before-mentioned cases have been determined as to the practice of the Courts of *India* and the powers of the Judges executing decrees of those Courts, the power of a subordinate Court executing an Order of Her Majesty in Council has also been considered in the two cases cited from the *Weekly Reporter*, in which judgment was given by Mr. Justice *Mitter*; and it appears, that as to Orders in Council as well as to decrees of the Indian Courts, the existing practice is that interest cannot be given in execution unless it is specially directed to be given.

It appears to their Lordships that the principle of the decisions which have established this practice is sound, and that the Plaintiffs

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\* 7 Moo. P. C. (N. S.) 331; Law Rep. 3, P. C. 465.



have failed to shew that the order made by the Chief Court of the Punjab is erroneous, in that it has refused to allow interest on the sum of Rs. 12,354. 12a.

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### CALCUTTA HIGH COURT.

*The 19th and 22nd March 1877.*

PRESENT :

Mr. Justice White.

IN THE MATTER OF THE EMPRESS OF INDIA ON THE PROSECUTION OF  
MALCOLM\* v. GASPER AND OTHERS.

*High Courts' Criminal Procedure Act (X of 1875), s. 147—  
Transfer of Case before Police Magistrate to High Court—Power to  
issue Mandamus.*

A charge was made against the accused of using criminal force under s. 141 of the Penal Code. The Police Magistrate heard the evidence for the prosecution, and without disbelieving it, decided it did not amount to the offence charged. *Held* that, assuming that an error of law had been committed, the High Court had no power to issue a *mandamus* to the Magistrate to commit the defendants; it was not a case where the Magistrate had declined jurisdiction; he had exercised his jurisdiction and heard the case. *Held* also, it was not a case which the Court could transfer under s. 147 of the High Courts' Criminal Procedure Act.

WHITE, J.—I have, in the course of the argument, stated my views so fully that it is unnecessary to do more than recapitulate the reasons for my decision.

Mr. Phillips, on behalf of the prosecution, applies, on affidavit, for one of two orders—either for a rule under s. 147 of the High Courts' Criminal Procedure Act (X of 1875), calling on the Magistrate to show cause why these proceedings should not be transferred to this Court for hearing and final determination, or for a *mandamus* to compel the Magistrate to commit on a charge of being a member of an unlawful assembly under s. 141 of the Penal Code.

When the case came before me on the first occasion, I was informed that the Police Magistrate, having heard the evidence, did not disbelieve the facts proved, but thought that they did not amount to the offence with which the defendants were charged, and,

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\* *Vide* I. L. R. 2. Calcutta Series, p. 278.

therefore, declined to commit them for trial. When I heard that such was the nature of the case, I requested Mr. Phillips to refer me to some authority for my granting his application. He has not brought before me, however, any authority which shows that either the Court of Queen's Bench, or this Court, has ever issued a *mandamus*, or granted a *certiorari*, in a case similar to the present one. He has, indeed, referred me to two cases, *The Queen v. Adamson*\* and *The King v. The Justices of Kent* † in which the Court of Queen's Bench granted a writ; in the first case, ordering the Justices to hear and determine a case which they had refused to hear; and in the second case, ordering them to issue a summons, which they had refused to issue. But both these cases, when examined, show that the Court of Queen's Bench does not issue a *mandamus* in such cases unless the inferior Court has actually declined jurisdiction, or has acted under circumstances which amount practically to declining jurisdiction. Now in this case the Magistrate has not declined to exercise jurisdiction. He has heard the evidence in the case, and has come to the conclusion that no offence under the Penal Code has been committed. He has, in fact, exercised his jurisdiction, and decided the case in favor of the defendants. This is sufficient to dispose of the first branch of Mr. Phillips' application. Quite irrespective, however, of this, I may state that a *mandamus* could not issue in the form asked for; if it issued at all, it would go not to order the Magistrate to commit, but to order him to hear the case again, and upon a sufficient case being made out, then to commit.

As to the second branch of the application, which is to transfer the case to this Court under s. 147 of Act X of 1875, I think I am equally without power to deal with the case in the way I am asked to do. That section provides, that "whenever it appears to the High Court that the direction hereinafter mentioned will promote the ends of justice, it may direct the transfer to itself of any particular case, and shall have power to determine the case so transferred, and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form, but on the merits only." The present case is not, I think,

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\* 1 Q. B. D. 201.

† 14 East, 395.

within the purview of the section. If I transferred it, I should be doing so not for the purpose of quashing or affirming a conviction or other proceeding, but for the purpose of hearing the case, taking the evidence of the witnesses, and myself determining whether a case for committal had been made out or not. I think the section is not wide enough to enable me to do that, and I should be extending the section beyond the intention of the Legislature if I put it in force to transfer such a case as this.

I can well imagine that the refusal of a Magistrate to commit may now and then result in a grievous failure of justice, but if the Legislature intended to provide for such a case, the Court should have been specifically armed with power to deal with such case. I cannot infer such a power in the absence of express words. I am, therefore, unable to grant this application. I have assumed throughout these remarks that an error of law has been committed, but I have made that assumption only for the purposes of the argument. Considering the law bearing on the application to be such as I have stated, I have thought it unnecessary to hear the affidavit. The refusal to commit is not tantamount to an acquittal, and the prosecution can, if they choose, go before the Magistrate again, though I am by no means saying they ought to do so. The application must be refused.\*

### CALCUTTA HIGH COURT.

*The 19th and 23rd April 1877.*

PRESENT:

Mr. Justice Macpherson.

THE CORPORATION† OF CALCUTTA *v.* BHEECUNRAM NAPI†  
*alias* BHEECUN NAPI†.

*High Courts' Criminal Procedure Act (X of 1875), s. 147—  
Acquittal—Presidency Magistrates' Act (IV of 1877), s. 181—  
The Calcutta Municipal Act. Beng. Act IV of 1876, ss. 75—79.*

The powers of interference given to the High Court by s. 147 of the High Courts' Criminal Procedure Act, were not intended to be exercised in the case of an acquittal by the Magistrate, but only in the case of convictions or other orders whereby a defendant is aggrieved or injured.‡

\* See *Corporation of Calcutta v. Bheecunram Napit*, *post*.

† Vide I. L. R. 2. Calcutta Series p. 291.

‡ See *Malcolm v. Gasper*, *ante* p. 278.

In this case, the defendant was accused of carrying on a profession within the town of Calcutta without taking out a license under Act (Beng.) IV of 1876. The defendant urged that as that Act came into force on the 1st July 1876, he had offered to pay half the license fee chargeable for the year and was not further liable. The license officer, however, refused to accept a sum less the fee for the whole year. The Magistrate who heard the case was of opinion that the defendant's liability only commenced from the 1st of July 1876 and that as he offered to pay the fee for the latter half of 1876 and was still willing to pay it, he incurred no penalty, and was discharged. The present application was made either for the transfer of the case to the High Court or for a *mandamus* to compel the Magistrate to commit.

MACPHERSON, J.—I am of opinion that s. 147 gives me no power to grant this application. The object in fact is to appeal against an acquittal. But s. 147 does not provide for such an appeal. It contemplates the transfer of a case before disposal, or interference on behalf of persons aggrieved or injured by an order of the Magistrate. But there was no intention to give power to interfere in order to set aside an acquittal. If it had been intended to give that remedy, it would, no doubt, have been expressly given, as in the Criminal Procedure Code and in the Presidency Magistrates' Act IV of 1877. One section of the latter Act (s. 181) really shows that s. 147 was intended to apply only where there has been a conviction, for it makes notice to the Government prosecutor necessary before an application can be made under s. 147.

Even, however, if I had the power to interfere, I would not exercise it in such a case as this.

*Application refused.*

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## CALCUTTA HIGH COURT.

*The 11th December 1876 and 20th February 1877.*

## FULL BENCH.

## PRESENT :

Sir Richard Garth, *Kt. Chief Justice*, Mr. Justice Kemp, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

CHUNDER NATH SEN\* and another, *Petitioners*.

*Superintendence of High Court—24 and 25 Vict., c. 104, s. 15—*

*Order under Criminal Procedure Code (Act X of 1872), s. 518.*

The High Court cannot interfere, under s. 15 of the Charter Act, with orders duly passed by a Magistrate under s. 518 of the Criminal Procedure Code.

The opinion of the Full Bench was delivered by

GARTH, C, J,—As the Magistrate states that riot or affray was imminent, and that he considered that the direction he gave tended to prevent, and was likely to prevent, a riot or affray, and as the facts stated by the Magistrate show that there were some grounds for the opinion which he expressed, we think that he had power, under s. 518 of the Criminal Procedure Code, to make the order complained of. This Court, therefore, cannot interfere with it under s. 15 of the Statute 24 and 25 Vict., cap. 104; nor can the Court interfere on any other ground, as by s. 520 the order made is declared not to be a judicial proceeding, however much it may infringe upon what are, or may be (irrespective of this section), the undoubted legal rights of the petitioners.

*Petition dismissed.*

## NEW AND OLD CIVIL PROCEDURE CODES COMPARED.

Messrs. Higginbotham & Co., of Madras, have lately published a very small but fine pamphlet entitled "COMPARATIVE TABLES exhibiting in juxtaposition, numbers of sections of the new CIVIL PROCEDURE CODE, Act X of 1877, and of the old Code Act No. VIII of 1859 and other sundry Acts and *vice versa* by Taloor Swamy Row, Head Clerk, District and Sessions Court, Bellary." The object of the author in making the publication is to facilitate references. We think that this little and unpretending contribution will at present be of considerable service to the Bar as well as to the Bench in helping them to find out the decisions applicable to each section of

\* *Vide* I. L. R. 2. Calcutta, p. 293.

the New Procedure Code, inasmuch as it is not likely that Mr. Broughton or Mr. Field will be able to bring out their valuable annotations before the expiry of the current year, and since the new Code having come into operation, the Bench and the Bar are in great need of references to correctly understand and apply the sections of the new Code. The price of the book is only six annas. In order to show to our readers the usefulness of the work under notice we make the following extracts :—

### LIST OF ABBREVIATIONS.

*A. C. P.*—Amended Code of Civil Procedure (Act XXIII of 1861.)

*B. E. A.*—Bill of Exchange Act (V of 1866.)

*M. S. A.*—Mofussil Small Cause Court Act (XI of 1865.)

*Rep*—Repealed by former enactments.

### PART I.

The following Table exhibits the numbers of Sections of the new Civil Procedure Code (Act X of 1877) and the numbers of corresponding Sections of the old Code (Acts VIII of 1859 and XXIII of 1861), the Mofussil Small Cause Court Act (XI of 1865) and the Bill of Exchange Act (V of 1866) arranged in the order of Sections of the New Act.

Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.
1	{ 42 A. C. P. 387 385	16 17	5 5	35 36	115 16	49 50	26 26
2	{ 386 41 A. C. P.		8 } 4 A. C. P.	37 38	17 cl. 1 & 2 17 latter pt.	51	27 28
3 para. 3	{ 387 47 M. S. A.		9 } M. S. A.	39 40	18 18	52 53	27 29
5	383	19	{ 11 12	41 42	{ 50 51	54	{ 31 32
6	384	20	4 A. C. P.	43	7	56	36
7	382	22	11	44	{	57	{ 30 3 A. C. P.
10	4	23	12	rule (a)	10	58	
11	1	24	13	45	{ 8	58	
13	2	25	6	46	{ 9	last para.	38
15	6	32	73	48	25		

## PART I.—(continued.)

Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.
59	39	111	121	192	173	249	217
61	14 B. E.A.	112	122	198	183	250	221
62	39	114	123	200	184	251	222
63	39	115	123	201	185	252	203
64	41	116	124	202	185	253	204
66	42	118	125	203	} 185	254	201
67	42	119	125	para. 2		256	13 A. C. P.
68	41	120	127	204	186	257	206
69	45	137	138	205	189	258	206
70	43	138	128	206	189	259	200
72	47	139	128	207	190	260	200
73	48	140	129	208	191	261	202
74	48	141	132	209	} 10 A. C. P.	262	202
75	49	142	134	210		194	} 199
76	11 M. S. A.	143	134	211	196	263	
77	61	} 144	135	212	197	264	224
78	53		136	216	195	265	225
79	54	} 146	137	217	198	} 266	205
80	} 55		139	219	187		} bracketed
81		56	147	220	187	} part of	
82	} 2nd para.	148	140	223	} 286		} 273 & 280.
83		57	149	141		last par.	
84	58	150	142	} 224	285	267	219
85	59	151	143		224	286	} 268
86	60	152	144	225	286	268	
87	61	154	145	226	287	} 269	241
88	62	155	145	} 228	287		269
89	63	156	146		228	289	270
90	64	157	147	} 229	294	272	237
91	65	158	148		229	284	} 274
92	} 2 A. C. P.	159	149	230	} 207	274	
93		109	160	151		para. 1	275
94	5 A. C. P.	161	151	231	207	276	240
95	110	162	151	232	208	277	242
96	} 7 A. C. P.	163	152	} 234	210	} 278	246
97		110	164		153		211
98	} 100 (a)	165	171	235	212	280	246
99		(b)	166	154	236	214	281
100	(c)	167	159	237	213	283	246
101	111	168	160	238	213	} 284	247
102	112	169	160	239	290		284
103	113	170	160	240	291	286	248
104	114	171	} 9 A. C. P.	241	293	287	249
105	115	172		242	292	289	249
106	60	173	167	243	} 209	290	249
107	116	174	168	244		293	293
108	117	175	175	245	} 11 A. C. P.	} 295	} 270
109	118	176	170	246			
110	119	177	} 172	247	209	296	245
111	120	178		248	216	297	251

## PART I—(continued.)

Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.
298	252	361	99	419	52	510	319
299	266	362	100	420	67	511	319
300	262	363	101	421	67	512	319
301	265	364	101	422	69	513	317
302	267	365	102	422	68	514	318
303	261	366	102	423	69	515	318
305	243	367	103	426	70	516	320
306	253	368	104	427	71	517	321
307	254	369	105	428	72	518	322
308	254	370	106	429	201	519	322
309	255	373	97	432	17 cl. 4	520	323
310	14 A. C. P.	374	97	435	28	521	324
311	256	375	98	436	63	522	325
312	257	380	34	46	46	523	326
314	256		35		19	524	326
315	258		34		20	525	327
316	259	381	35	466	20	526	327
317	260	383	175	468	62	527	328
318	263	384	175	469	295	528	328
319	264	385	175	477	74	529	329
326	244	386	175	80	80	530	330
328	226		176		75	531	331
329	227		72	478	80	532	2 B. E. A.
330	228	387	177	479	76	533	3 do.
331	229	389	178		77	534	4 do.
332	230		179		24 A. C. P.	535	5 do.
333	231	390	179	481	78	536	6 do.
334	268	392	180	483	81	537	7 do.
335	269	393	180		82	538	8 do.
339	276	394	181		83	540	23 A. C. P.
340	279	395	181	484	84	541	333
341	278	397	182	485	85		334
	282	398	180	486	86		335
342	282	399	180	487	87	542	334
	278	400	180	488	89	543	336
344	273		181	489	79	544	337
	280		297	491	88	545	338
345	273	401	298	492	92	546	36 A. C. P.
	280	402	299		93	547	340
346	273	403	300		95	548	341
	280	404	301	494	93	549	342
347	281	405	302	496	96	550	343
349	8 A. C. P.	406	303	497	91	552	344
350	8 A. C. P.	407	304	501	92	553	345
351	281	408	305	503	92	554	345
	8 A. C. P.	409	306	504	312	556	346
357	282	410	308	506	313	557	6 A. C. P.
358	282	411	309	507	314	558	347
359	275	413	310	508	315	561	348
	281	417	17 cl. 3	509	316	562	351



## PART I—(continued.)

Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.	Sections of new Act.	Sections of old Act.
564	352	581	361	590	366	622	35 A. C. P.
565	353	582	37 A.C.P.		363	623	376
566	354	583	362	591	364	626	378
567	354	584	372		367	627	379
568	355	586	27 A.C.P.	592	370	629	378
569	356	588		593	370	630	380
570	357	cl. (e)	36		28 A.C.P.	640	21
	349	" (f)	119	617	22 M.S.A.	641	22
571	359	" (g)	11 A.C.P.		29 A.C.P.		16, 17 & 19
572	359	" (h)	11 A.C.P.	618	23 M.S.A.	643	A. C. P.
573	359	" (m)	257		32	646	42 M. S. A.
574	359	" r(479)	76	619	33 A. C. P.	647	38 A. C. P.
575	23 A. C. P.	" (492)	94		25	649	296
576	359	" (493)	94		26 M. S. A.	650	220
577	350	" (496)	94		34 A.C.P.	652	40 A. C. P.
578	350	" (503)	94	620	27 M.S.A.		
579	360	" (i)	325	621	28 M. S. A.		
580	360	" (u)	365				

## PART II.

Numbers of Sections of the Revised Act (X of 1877) which have been newly enacted.

4	86	199	288	378	482	589
9	87	{ 203	291	379	490	{ 594
		{ para 1.				{ to
12	88	213	292	382	495	{ 616
14	90	214	294	388	498	624
18	94	215	304	391	499	625
21	95	218	313	396	500	628
26 to 31	113	221	320	412	502	{ 631
			to			{ to
			325			{ 639
33	117	222	327	414	505	642
34	121	223	336	415	509	
	to	except			551	
	136	last				
42	145	para. }	337	416	555	644
44 rule (b)	153	227	338	418	559	645
46	166	230	343	424	560	648
		except				
		para 1 }				
47	173	233	348	425	563	651
55	178	247	352	430	585	
		to				
58 }	179	255	356	431	587	
except						
last para. }	180	271	360	433	588	
					clauses	
60	191	273	371	434	a, b, c,	
65	193	279	372	437	d, g, h, i,	
				to		
71	194	282	376	464	k, n, o, p,	
	to			470		
82 }	197	285	377	476	q, s, v, w.	
first						
para. }						

### PRINCIPLES OF THE INDIAN PENAL CODE.

(As explained by the original framers and laid before the Governor-General of India in Council in the year 1837.)

#### NOTE A .

#### ON THE CHAPTER OF PUNISHMENTS.

First among the punishments provided for offences by this Code stands death. No argument that has been brought to our notice has satisfied us that it would be desirable wholly to dispense with this punishment. But we are convinced that it ought to be very

sparingly inflicted, and we propose to employ it only in cases where either murder, or the highest offence against the State has been committed.

We are not apprehensive that we shall be thought by many persons to have resorted too frequently to capital punishment. But we think it probable that many even of those who condemn the English statute book as sanguinary may think that our Code errs on the other side. They may be of opinion that gang-robbery, the cruel mutilation of the person, and possibly rape, ought to be punished with death. These are doubtless offences which, if we looked only at their enormity, at the evil which they produce, at the terror which they spread through society, at the depravity which they indicate, we might be inclined to punish capitally. But atrocious as they are, they cannot, as it appears to us, be placed in the same class with murder. To the great majority of mankind nothing is so dear as life. And we are of opinion that to put robbers, ravishers, and mutilators on the same footing with murderers is an arrangement which diminishes the security of life.

There is in practice a close connection between murder and most of those offences which come nearest to murder in enormity. Those offences are almost always committed under such circumstances that the offender has it in his power to add murder to his guilt. They are often committed under such circumstances that the offender has a temptation to add murder to his guilt. The same opportunities, the same superiority of force, which enabled a man to rob, to mangle, or to ravish, will enable him to go further and to dispatch his victim. As he has almost always the power to murder, he will often have a strong motive to murder, inasmuch as by murder he may often hope to remove the only witness of the crime which he has already committed. If the punishment of the crime which he has already committed be exactly the same with the punishment of murder, he will have no restraining motive. A law which imprisons for rape and robbery, and hangs for murder, holds out to ravishers and robbers a strong inducement to spare the lives of those whom they have injured. A law which hangs for rape and robbery, and which only hangs for murder, holds out, indeed, if it be rigorously carried into effect, a strong motive to deter men from rape and robbery, but as soon as a man has ravished, or robbed, it

holds out to him a strong motive to follow up his crime with a murder.

If murder were punished with something more than simple death, if the murderer were broken on the wheel, or burned alive, there would not be the same objection to punishing with death those crimes which in atrocity approach nearest to murder. But such a system would be open to other objections so obvious that it is unnecessary to point them out. The highest punishment which we propose is the simple privation of life ; and the highest punishment, be it what it may, ought not, for the reason which we have given, to be assigned to any crime against the person which stops short of murder. And it is hardly necessary to point out to his Lordship in Council how great a shock would be given to public feeling if, while we propose to exempt from the punishment of death the most atrocious personal outrages which stopt short of murder, we were to inflict that punishment even in the worst cases of theft, cheating, or mischief.

It will be seen that, throughout the Code, wherever we have made any offence punishable by transportation, we have provided that the transportation shall be for life. The consideration which has chiefly determined us to retain that mode of punishment is our persuasion that it is regarded by the natives of India, particularly by those who live at a distance from the sea, with peculiar fear. The pain which is caused by punishment is unmixed evil. It is by the terror which it inspires that it produces good : and perhaps no punishment inspires so much terror in proportion to the actual pain which it causes as the punishment of transportation in this country. Prolonged imprisonment may be more painful in the actual endurance : but it is not so much dreaded before hand : nor does a sentence of imprisonment strike either the offender or the by-standers with so much horror as a sentence of exile beyond what they call the Black Water. This feeling, we believe, arises chiefly from the mystery which overhangs the fate of the transported convict. The separation resembles that which takes place at the moment of death. The criminal is taken for ever from the society of all who are acquainted with him, and conveyed by means of which the natives have but an indistinct notion over an element which they regard with extreme awe, to a distant country of which they know nothing, and from which he is never to return. It is natural that his fate

should impress them with a deep feeling of terror. It is on this feeling that the efficacy of the punishment depends, and this feeling would be greatly weakened if transported convicts should frequently return, after an exile of seven or fourteen years, to the scene of their offences, and to the society of their former friends.

We may observe that the rule which we propose to lay down is already in force in almost every part of British India. The Courts established by the Royal Charters, and Courts Martial, are at present the only Courts which sentence offenders to transportation for any term short of life. In the case of European offenders who are condemned to long terms of imprisonment, we allow the Government to commute imprisonment for transportation not perpetual. But in that case we are of opinion that in general the transported criminal ought not, after the expiration of the term for which he is transported, to be allowed to return to India. This rule and the reasons for it will be considered hereafter.

Of imprisonment we propose to institute two grades; rigorous imprisonment and simple imprisonment. But we do not think the Penal Code the proper place for describing with minuteness the nature of either kind of punishment.

We entertain a confident hope that it will shortly be found practicable greatly to reduce the terms of imprisonment which we propose. Where a good system of prison-discipline exists, where the criminal, without being subject to any cruel severities, is strictly restrained, regularly employed in labor not of an attractive kind, and deprived of every indulgence not necessary to his health, a year's confinement will generally prove as efficacious as confinement for two years in a gaol where the superintendence is lax, where the work exacted is light, and where the convicts find means of enjoying as many luxuries as if they were at liberty. As the intensity of the punishment is increased its length may safely be diminished. As members of the committee which is now employed in investigating the system followed in the gaols of this country, we have had access to information which enables us to say with confidence that in this department of the administration extensive reforms are greatly needed, and may easily be made. The researches of that committee will, we hope, enable the Law Commission hereafter to prepare such a Code of Prison-Discipline, as, without shocking the humane feelings of the community, may yet be a terror to the most hardened

wrong doers. Whenever such a Code shall come into operation, we conceive that it will be advisable greatly to shorten many of the terms of imprisonment which we have proposed.

It will be seen that we have given to the Government a power of commuting sentences in certain cases without the consent of the offender. Some of the rules which we have laid down on this subject will be universally allowed to be proper. It is evidently fit that the Government should be empowered to commute the sentence of death for any other punishment provided by the Code. It seems to us also very desirable that the Government should have the power of commuting perpetual transportation for perpetual imprisonment. Many circumstances of which the executive authorities ought to be accurately informed, but which must often be unknown to the ablest judge, may, at particular times, render it highly inconvenient to carry a sentence of transportation into effect. The state of those remote Provinces of the Empire in which convict settlements are established, and the way in which the interest of those Provinces may be affected by any addition to the convict population, are matters which lie altogether out of the cognizance of the tribunals by which those sentences are passed, and which the Government only is competent to decide.

The provisions contained in Clauses 43 and 44 are more likely to cause difference of opinion. We are satisfied that both humanity and policy require that those provisions, or provisions very similar to them, should be adopted.

The physical difference which exists between the European and the native of India renders it impossible to subject them to the same system of prison-discipline. It is most desirable, indeed, that in the treatment of offenders convicted of the same crime and sentenced to the same punishment there should be no apparent inequality. But it is still more desirable that there should be no real inequality, and there must be real inequality unless there be apparent inequality. It would be cruel to subject an European for a long period to a severe prison-discipline, in a country in which existence is almost constant misery to an European who has not many indulgences at his command. If not cruel it would be impolitic. It is unnecessary to point out to his Lordship in Council how desirable it is that our national character should stand high in

the estimation of the inhabitants of India, and how much that character would be lowered by the frequent exhibition of Englishmen of the worst description, placed in the most degrading situations stigmatized by the Courts of Justice, and engaged in the ignominious labor of a gaol.

As there are strong reasons for not punishing Europeans with imprisonment of the same description with which we propose to punish natives, so there are reasons equally strong for not suffering Europeans who have been convicted of serious crimes to remain in this country. As we are satisfied that nothing can add more strength to the Government, or can be more beneficial to the people, than the free admission of honest, industrious, and intelligent Englishmen, so we are satisfied that no greater calamity could befall either the Government or the people, than the influx of Englishmen of lawless habits and blasted character. Such men are of the same race and color with the rulers of the country, they speak the same language, they wear the same garb. In all these things they differ from the great body of the population. It is natural and inevitable that in the minds of a people accustomed to be governed by Englishmen, the idea of an Englishman should be associated with the idea of government. Every Englishman participates in the power of Government though he holds no office. His vices reflect disgrace on the Government though the Government gives him no countenance.

It was probably on these grounds that Parliament, at the same time at which it threw open a large part of India to British-born subjects of the King, directed the local legislature to provide against those dangers which might be expected from an influx of such settlers. No regulation can, in our opinion, promote more effectually, or in a more unexceptionable manner, the end which Parliament had in view, than that which we now propose.

We recommend that whenever a person not both of Asiatic birth and of Asiatic blood commits an offence so serious that he is sentenced to two years of simple imprisonment, or to one year of rigorous imprisonment, it shall be competent to the Government to commute that punishment for banishment from the Territories of the East India Company.

( To be continued. )

## EXAMINATIONS FOR THE CIVIL SERVICE OF INDIA.

Regulations for the Open Competition of July, 1878.

*N. B.—The Regulations are liable to be altered in future years.*

1. On June 25th, 1878, and following days, an Examination of Candidates will be held in London. At this Examination not fewer than        Candidates will be selected, if so many shall be found duly qualified. Of these,        will be selected for the presidency of Bengal, [        for the Upper Provinces and        for the Lower Provinces,]        for that of Madras, and        for that of Bombay.\*—Notice will hereafter be given of the days and place of Examination.

2. Any person desirous of competing at this Examination must produce to the Civil Service Commissioners, before the 1st of May, 1878, evidence showing :—

(a) That he is a natural-born subject of Her Majesty.

(b) That his age on the 1st of January, 1878, will be above seventeen years and under nineteen years. [N. B.—In the case of Natives of India this must be certified by the Government of India, or of the Presidency or Province in which the Candidate may have resided.]

(c) That he has no disease, constitutional affection, or bodily infirmity unfitting him, or likely to unfit him, for the Civil Service of India.†

(d) That he is of good moral character.‡

He must also pay such fee as the Secretary of State for India may prescribe.‡

3. Should the evidence upon the above points be *prima facie* satisfactory to the Civil Service Commissioners, the Candidate will, upon payment of the prescribed fee, be admitted to the Examination. The Commissioners may, however, in their discretion, at any time prior to the grant of the Certificate of Qualification hereinafter

\* The number of appointments to be made, and the number in each Presidency, &c., will be announced hereafter. It will probably be about half the usual number.

† Evidence of health and character must bear date not earlier than the 1st April, 1878.

‡ The fee for this Examination will be £5, payable by means of a special stamp according to instructions which will be communicated to Candidates.



referred to, institute such further inquiries as they may deem necessary; and if the result of such inquiries, in the case of any Candidate, should be unsatisfactory to them in any of the above respects, he will be ineligible for admission to the Civil Service of India: and if already selected, will be removed from the position of a Probationer.

4. The Examination will take place only in the following branches of knowledge:—

	Marks.
§ English Composition ... ..	300
** History of England—including a period selected by the Candidate ... ..	300
** English Literature—including books selected by the Candidate ... ..	800
Greek ... ..	600
Latin ... ..	800
French ... ..	500
German ... ..	500
Italian ... ..	400
§ Mathematics (pure and mixed) ... ..	1000
†† Natural Science: that is, the Elements of any two of the following Sciences, viz. :—	
Chemistry, 500; Electricity and Magnetism, 300; Experimental Laws of Heat and Light, 300; Mechanical Philosophy, with outlines of Astronomy, 300.	
Logio ... ..	800
Elements of Political Economy ... ..	300
†† Sanskrit ... ..	500
†† Arabic ... ..	500

§ Marks assigned in English Composition and Mathematics will be subject to no deduction.

\*\* A considerable portion of the marks for English History and Literature will be allotted to the work specially prepared. In awarding marks for this regard will be had partly to the extent and importance of the periods or books selected, and partly to the thoroughness with which they have been studied.

†† The Examination will range from Arithmetic, Algebra, and Elementary Geometry, up to the elements of the differential and integral calculus, including the lower portions of applied Mathematics.

‡‡ The standard of marking in Sanskrit and Arabic will be determined with reference to a high degree of proficiency, such as may be expected to be reached by a Native of good education.

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Candidates are at liberty to name, before May 1st, 1878, any or all of these branches of knowledge. No subjects are obligatory.

5. The merit of the persons examined will be estimated by marks; and the number set opposite to each branch in the preceding regulation denotes the greatest number of marks that can be obtained in respect of it.

6. The marks assigned to Candidates in each branch will be subject to such deduction as the Civil Service Commissioners may deem necessary, in order to secure that a "Candidate be allowed no credit at all for taking up a subject in which he is a mere smatterer."

7. The Examination will be conducted by means of printed questions and written answers, and by *viva voce* Examination, as may be deemed necessary.

8. The marks obtained by each Candidate, in respect of each of the subjects in which he shall have been examined, will be added up, and the names of the Candidates who shall have obtained a greater aggregate number of marks than any of the remaining Candidates, will be set forth in order of merit, and such Candidates shall be deemed to be selected Candidates for the Civil Service of India, provided they appear to be in other respects duly qualified. Should any of the selected Candidates become disqualified, the Secretary of State for India will determine whether the vacancy thus created shall be filled up or not. In the former case, the Candidate next in order of merit, and in other respects duly qualified, shall be deemed to be a selected Candidate. A selected Candidate declining to accept the appointment which may be offered to him will be disqualified for any subsequent competition.

9. Selected candidates, before proceeding to India, will be on probation for two years, during which time they will be examined periodically, with a view of testing their progress in the following subjects :—\*

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\* Full instructions as to the course of study to be pursued will be issued to the successful candidates as soon as possible after the result of the open competition is declared.

	Marks.
1. Law ... ..	1,250
2. Classical Languages of India—	
Sanskrit ... ..	500
Arabic ... ..	400
Persian ... ..	400
3. Vernacular Languages of India (each)	400
4. The History and Geography of India	350
5. Political Economy ... ..	350

In these Examinations, as in the open competition, the merit of the candidates examined will be estimated by marks, and the number set opposite to each subject denotes the greatest number of marks that can be obtained in respect of it at any one Examination. The Examination will be conducted by means of printed questions and written answers, and by *viva voce* Examination, as may be deemed necessary. The last of these Examinations will be held at the close of the second year of probation, and will be called the "Final Examination," at which it will be decided whether a selected candidate is qualified for the Civil Service of India. At this Examination candidates will be permitted to take up any one of the following branches of Natural Science, *viz.*—Botany, Geology, and Zoology, for which 350 marks will be allowed.

10. Any Candidate who, at any of the periodical Examinations, shall appear to have wilfully neglected his studies, or to be physically incapacitated for pursuing the prescribed course of training, will be liable to have his name removed from the list of selected Candidates.

11. The selected Candidates who, at the Final Examination, shall be found to have a competent knowledge of the subjects specified in Regulation 9, and who shall have satisfied the Civil Service Commissioners of their eligibility in respect of age, health, and character, shall be certified by the said Commissioners to be entitled to be appointed to the Civil Service of India, provided they shall comply with the regulations in force, at the time, for that Service.

12. Applications from persons desirous to be admitted as Candidates are to be addressed to the "Secretary to the Civil Service Commissioners, London, S. W.," from whom the proper form for the purpose may be obtained.

September, 1877.

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The Civil Service Commissioners are authorized by the secretary of State for India in Council to make the following announcements :—

(1.) Selected Candidates will be permitted to choose,\* according to the order in which they stand in the list resulting from the open competition as long as a choice remains, the Presidency (and in Bengal the Division of the Presidency) to which they shall be appointed, but this choice will be subject to a different arrangement, should the Secretary of State, or Government of India, deem it necessary.

(2.) The Probationers, having passed the necessary Examinations, will be required to report themselves to their Government in India not later than the close of December, 1881.

(3.) The seniority in the Civil Service of India of the selected Candidates shall be determined according to the Order in which they stand on the list resulting from the Final Examination.

(4.) An allowance of £150 a year will be given during each of the two years of their probation to all Candidates who pass their probation at some University to be approved beforehand by the Secretary of State, provided such Candidates shall have passed the required Examinations to the satisfaction of the Civil Service Commissioners, and shall have complied with such rules as may be laid down for the guidance of selected Candidates.

(5.) All selected Candidates will be required, after having passed the second periodical Examination, to attend at the India office for the purpose of entering into an agreement binding themselves, amongst other things, to refund in certain cases the amount of their allowance in the event of their failing to proceed to India. A surety will be required.

(6.) \* After passing the Final Examination, each Candidate will be required to attend again at the India Office, with the view of entering into covenants. The stamps payable on these documents amount to £1.

(7.) Candidates rejected at the Final Examination of 1880 will in no case be allowed to present themselves for re-examination.

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\* This choice must be exercised immediately after the result of the open competition is announced, on such day as may be fixed by the Civil Service Commissioners.

## CALCUTTA HIGH COURT.

*The 23rd July and 12th September, 1877.*

### Full Bench.

#### PRESENT :

The Hon'ble Sir R. Garth, Kt, Chief Justice, and the Hon'ble Mr. Justice Jackson, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Anallie.

**KALI CHURN DUTT and others (Plaintiffs), Appellants,**  
*versus*

**JOGESH CHUNDER DUTT, (Defendants), Respondent.**

*Suit for recovering money paid under decrees subsequently reversed or superseded or modified.*

A suit for enhancement of rent having been decreed, the defendant appealed, but, pending the appeal, he paid the decretal amount, as well as the amount of subsequent decrees passed against him on the force of the first decree. In appeal, the suit for enhancement having been dismissed, the defendant (the present plaintiff) brought a suit for recovering the difference between the fixed rent and the enhanced rent which he had paid under the above circumstances.

*Held* by Macpherson, J., Anallie, and Markby, J J, (Garth, C. J., and Jackson, J. dissentient) that the plaintiff is in equity and good conscience entitled to have the whole of the rent which he paid at the enhanced rate refunded to him. The original decree (which was the sole basis of all the decrees made, pending the appeal) having been reversed, all the subsequent decrees were superseded, as they were mere subordinate and dependent decrees, and they cannot be held to have remained in force, so far as the enhanced rate of rent was concerned, when the decree on which they were dependent has been reversed.

Mr. R. E. Twidale for the Appellants.

The Standing Counsel, Mr. J. D. Bell, for the Respondent.

This was a case referred to a Full Bench by the Chief Justice and Mr. Justice McDonell, and the order of reference was as follows :—

This was a suit to recover certain sums by way of enhanced rent, which the plaintiff has been compelled to pay to the present defendant under certain decrees hereinafter mentioned.

The facts are these—

The plaintiff claimed to hold certain property under the defendant, at a permanent fixed rent of Rs. 461.

The defendant brought a suit against him to enhance that rent, one of the grounds of defence was that the rent was not legally capable of enhancement.

The Court of first instance gave the plaintiff a decree for an enhanced rent of Rs. 2,417, and the High Court, on appeal, affirmed that decree.

On appeal to the Privy Council, their Lordships, on the 25th day of March, 1878, reversed the judgments of both Courts, and held that the old rent could not legally be enhanced.

Meanwhile, between the date of the first decree for the enhanced rent, and the judgment of the Privy Council reversing that decree, the present defendant brought several suits for the enhanced rent against the plaintiffs, and obtained judgment for various sums, amounting to Rs. 8,561, which sums were duly paid by the present plaintiffs.

No application was made by the present plaintiffs for a review of those judgments; but on the 25th of November 1875, this suit was brought by the then plaintiffs to recover from the defendant the sum of Rs. 8,561, being the difference between the amount of enhanced rent recovered under those judgments, and the amount of the fixed rent which the plaintiffs were bound to pay.

The Courts below have given the plaintiffs a decree for this difference.

From this decree the defendant has appealed; and he contends that, according to the well-known rule of law laid down in *Marriott versus Hampton*, 2 Smith's Leading Cases (sixth edition), page 375, money paid under the judgment of a competent Court cannot be recovered back so long as that judgment remains unreversed.

The plaintiffs, on the other hand, contend that the case of *Shama Persad and others versus Hurro Persad and others*, 10 Moore's Indian Appeals, page 208, is an authority in his favour, and that the judgment for enhanced rent obtained after the first suit for enhancement was decreed, must be considered as superseded by the judgment of the Privy Council reversing that decree.

The case of *Raja Nilmoni Singh, Deo Bahadoor versus Saroda Persad Mukerji*, decided by Justices Kemp and Pontifex on 31st December 1872, and reported in the *Law Observer* of 1872-73, page 76, seems to favour this view; whereas the case of *Murari Mohajan versus Mahomed Akmal*, 22 Weekly Reporter, page 161, decided by Justices Kemp and Birch, seems opposed to it. See also decisions of Phear and Morris, J. J.—22 W. R., p. 213.

The point being an important one, and the decisions upon it being apparently conflicting, we think it right to refer this question to a Full Bench :—

Whether the plaintiff is entitled to recover in this suit the difference between the fixed rent and the enhanced rent which he has paid to the defendant under the above circumstances.

The judgment of the Court was as follows :—

*Ainslie, J.*—It is obvious that the defendant has received from the plaintiff, under successive decrees, made during the long period that elapsed between the decree for enhancement and the reversal of that decree by the order of Her Majesty in Council, sums of money for enhanced rent to which the final order in the enhancement suit shows that he is not entitled.

The plaintiff, as tenant, persistently refused to acknowledge his liability and compelled his landlord to recover the rent by suit, in order, as I understand it, to have a formal record that he paid only under compulsion.

The Courts were bound to follow the existing judgment by which the liability of the plaintiff to pay enhanced rents had been declared. They had no option in the matter at the time.

Under such circumstances, I cannot conceive that it was their intention to declare finally that the defendant was entitled to the enhanced rent for the periods covered by the several suits, irrespective of the result of the appeal to Her Majesty in Council, which was delayed for some fourteen years.

The order of Her Majesty in Council was such that, if it had been known at the time of making the decrees, they must of necessity have gone the contrary way, so far as the enhanced portion of the rent claimed was concerned ; and therefore, it seems to me that it did at once supersede the decrees based upon the reversed order of the High Court.

There appears to me to be a wide distinction between the re-opening of decrees based upon, and, necessarily controlled by, a previous decree, subsequently reversed in appeal, and the re-opening of decrees which the Court making them might have varied, had it not thought fit to follow a decree afterwards set aside.

Looking at the case of *Doorga Persad vs. Tara Persad*, I am of opinion that there is authority for saying that the former class of decrees is, *ipso facto*, superseded so soon as the controlling

decree is nullified ; and that what may have been done under them, is not final, but may be undone. The mode of proceeding for this purpose is not a question of serious importance. I agree in the judgment of Mr. Justice Macpherson.

*Macpherson, J.*—In my opinion, the principle on which the Privy Council acted in the case of Shama Persad Roy Chowdhary (10 Moore's Indian Appeals, 3 W. R., p. 111) is applicable, and the plaintiff is entitled to recover the difference between the rent for which he was really liable, and the enhanced rent which he paid, pending his appeal against the decree by which the rent was enhanced.

That decree (although in a suit instituted in 1859, before Act X came in force) was made by the Principal Sudder Ameen, on the 29th of June ; and the 1863 appeals to the Judge of the District and to this Court were decided on the 18th June 1864, and the 6th February 1865, respectively. An appeal to the Privy Council was filed here on the 20th of July 1865, and was finally disposed of by the decree of the Privy Council of the 5th of May 1873, which reversed the decisions of the Courts in this country, and found that the tenure was not liable to enhancement.

Pending these proceedings, the zemindar instituted no less than sixteen different suits for rent at the enhanced rate. Of these suits, twelve were brought under Act X. of 1859, and four under Act VIII. of 1869 B. C. In the first two of these suits, a portion of the claim was for rent at the old rate, for a period antecedent to the original decree for enhancement.

I assume that the plaintiff is in equity and good conscience entitled to have the whole of the rent which he paid at the enhanced rate refunded to him. All these decrees for the enhanced rent were based solely upon the decree for enhancement, which the Privy Council reversed in May 1873 ; and the only question to be decided now is, whether the plaintiff (if he has any remedy at all) is technically wrong in the remedy which he seeks.

The contention is that, as these subsequent decrees for rent at the enhanced rate are still unreversed, a suit will not lie to cover the money paid under them. It is suggested that, though our Courts had decided that the rent could be enhanced, the defendant ought not to have submitted to these later decrees, but should have contested each case, and appealed, if necessary, to the Privy Council in



each. And it is also said that he should apply, or should, on the Privy Council making its order in May 1873, have applied, for a review of judgment in each of the sixteen cases; and, having got the judgments reviewed and reversed, should obtain restitution in each suit.

. In thirteen, out of the sixteen, suits, the decree was for a sum under Rs. 1,000, and in seven of them it was far less than Rs. 500; and I should hesitate before declaring that, in the circumstances in which the plaintiff was placed, he was bound to appeal in all these suits, and incur the enormous expense necessarily involved in such a course—an expense far exceeding the amount in dispute.

As to applying for a review in each case, it is exceedingly doubtful, to say the least of it, how far a review could be obtained, or could at any time have been obtained, in the cases under Act X. of 1859, even supposing it obtainable in the four cases under Act VIII. of 1869 B. C. But, if it be granted that a review might have been obtained in each of the sixteen suits that mode of proceeding would have been, on the whole, much more cumbersome and inconvenient than the single suit which the plaintiff has instituted, embracing his whole claim.

Of course, these questions of convenience and the like, could not be taken into consideration at all, if there were any fixed rule prohibiting this suit from being brought. It seems to me, however, that not only is there no such fixed rule, but that the Privy Council has expressly decided (in Shama Persad Roy's case) that a suit such as this may properly be entertained by the Court.

In their judgment it is said :—"There is no doubt that, according to the law of England—and their Lordships see no reason for holding that it is otherwise in India—money recovered under a decree, or judgment, cannot be recovered back in a fresh suit, or action, whilst the decree, or judgment, under which it was recovered remains in force. But this rule of law rests, as their Lordships apprehend, upon this ground, that the original decree, or judgment, must be taken to be subsisting and valid, until it has been reversed, or superseded, by some ulterior proceeding. If it has been so reversed, or superseded, the money recovered under it ought certainly to be refunded; and, as their Lordships conceive, is recoverable either by summary process, or by a new suit or action. The true question, therefore, in such cases, is whether the decree, or judgment, under

which the money was originally recovered, has been reversed or superseded." Applying that rule to the case before us, I think that the original decree (which was the sole basis of all the decrees made, pending the appeal) having been reversed by the Privy Council, all the subsequent decrees were superseded by the Privy Council's order. It was plainly intended by the Privy Council's order, which decided that the rent of this tenure could not be enhanced, that the plaintiff should not pay rent at any rate higher than that for which the tenure was declared to be liable; and it is practically a contravention of the order to permit the decrees obtained by the zemindar, pending the appeal, to interfere with that intention. The subsequent decrees were more subordinate and dependent decrees, and they cannot, under the circumstances of this case, be held to have remained in force, so far as the enhanced rate of rent was concerned, when the decree on which they were dependent has been reversed. I am aware that in Shama Persad Roy's case, the order made by the Privy Council turned in some degree on the peculiar terms of their original order. But, giving full weight to that fact, it seems to me clear that their Lordships admit the principle that the main decree being reversed, which was the basis of the subsequent decrees, these latter, being subordinate and dependent decrees, were superseded. It cannot be disputed that, although the later and subordinate decrees remained unreversed, the Privy Council held that a separate suit lay to recover what had been wrongly paid under those decrees. And this was evidently the view taken of the effect of Shama Persad Roy's case by *Kemp* and *Pontifex, J. J.*, in the case of *Raja Nilmoni Singh vs. Saroda Persad Mookerji* (decided on the 2nd September 1872, and reported in the *Law Observer* for that year, page 76.)

The question of Limitation is not raised in the order of reference. But I incline to agree with the Subordinate Judge (and substantially for the reasons given by him) in thinking that the suit is not barred.

The circumstances of this case are peculiar, and it is impossible, in dealing with it, to lay down any rule of very general application. The plaintiff has practically no remedy, unless this suit will lie.

*Markby, J.*—I concur in this judgment.

*Garth, C. J.*—I am of opinion that the decree made by the Privy Council in the case of *Ram Churn Dutt vs. Romesh Chunder Dutt*

did not supersede, or modify, the several decrees which had been previously obtained for enhanced rent by the present defendants; and consequently, that the plaintiffs in this case are not entitled to recover.

The plaintiffs base their claim entirely upon the authority of the case of *Shama Persad vs. Tara Persad* (30 M. I. Appeal, 203), contending that the principle upon which that case proceeded, applies to the present, and that the decrees for enhanced rent obtained by the present defendant since the year 1864 have been partially superseded, or modified, by the decree of the Privy Council in the above case of *Ram Chunder Dutt vs. Romesh Chunder Dutt*.

We are bound, of course, to accept the decision in *Shama Persad vs. Tara Persad* as binding upon this Court, so far as it goes; but, if the principle of it is to be extended, as the plaintiffs contend it ought to be, it will lead, in my opinion, to very inconvenient consequences, and to a direct departure from a rule of law which has been established for years, and has always been acted upon in England and in this country.

Now, in order to see how far the authority of the case of *Shama Persad vs. Tara Persad* is applicable to the present, it is necessary to ascertain, in the first place, what the grounds of that decision really were.

The case was a very peculiar one.

In the year 1821, Doorga Persad, claiming to be heir to his uncle, brought a suit against Shama Persad, a debtor to his uncle's estate, for Rs. 23,024, the principal and interest due upon a bond.

Pending this suit, Tara Persad sued Doorga Persad for one-half of the uncle's property, and in 1829 a compromise was effected of that suit, under which Tara Persad became entitled to a six-anna share of the debt due from Shama Persad.

Subsequent to this, Doorga Persad obtained a decree against Shama Persad for the principal and interest due upon the bond. From this decree Shama Persad appealed to the Sudder Court, and pending that appeal, in 1831, there was a compromise of that suit also, under which Shama Persad was to pay Rs. 27,127 at the end of three years, without interest, in default of which payment Doorga Persad was to be at liberty to realize the amount. This compromise was made without Tara Persad's knowledge; and Shama

Persad did not pay the stipulated amount at the end of the three years.

In this state of things, Tara Persad, in March 1835, brought another suit against Doorga Persad, claiming a six-anna share of the bond debt and interest due up to the commencement of Doorga Persad's first suit in 1821; and in his plaint he reserved to himself the right of bringing another suit for his share of the interest upon the bond debt from 1821 to the 27th July 1829, on which day Doorga Persad obtained his decree against Shama Persad.

This suit was carried through the Courts of this country up to the Sudder Dewanny Adawlut, where, eventually, a decree was made against Doorga Persad for the entire amount of principal and interest sued for.

From this decree Doorga Persad appealed to the Privy Council, who decreed, in 1849, that the decree of the Sudder Court ought to be reversed, and that Doorga Persad was not liable to Tara Persad for the whole amount of his six-anna share and interest of the debt. Their Lordships held that *Doorga Persad ought to be considered as a trustee for Tara Persad, and was only responsible for so much of the debt as he had actually received, or without his wilful default might have recovered.* And an order was made accordingly by their Lordships that the decree of the Sudder Dewanny Adawlut should be reversed; that Doorga Persad should be declared liable to Tara Persad for a six-anna share of what he had received, or might thereafter receive, or what he might have received but for his wilful defaults, for and in respect of the sum of Rs. 24,217-12 and the interest thereon; and the case was referred back to the Sudder Dewanny Adawlut to ascertain, carry out, and enforce the rights and liabilities of the parties as above declared.

From the 11th of March 1835, when the above suit was commenced, to the 5th of July 1849, when the judgment of the Privy Council was pronounced, upwards of fourteen years had elapsed; and during that interval, in the year 1842, an action was brought in this country by Tara Persad against Doorga Persad to recover Rs. 4,593-12-9, being the amount of interest on the six-anna share of the bond debt, for which, in his previous proceedings, he had reserved his right to sue; and in this action he obtained a decree for the Rs. 4,593-12-9, with interest at 12 per cent., amounting to

Rs. 11,127-15-3, which he accordingly paid thus—Rs. 8,200-7-3 on the 28th of April 1848, and Rs. 2,927-8 on the 4th August 1857.

Several attempts were made by Doorga Persad to have this decree for interest dealt with and adjusted by the Sudder Dewanny Adawlut as part of the entire subject matter of the first suit, upon which the Privy Council had passed their judgment; but, failing these attempts, he brought a suit against Tara Persad to recover back the Rs. 11,127-15-3, which he had been unjustly compelled to pay.

The suit was decided against him by the Courts of this country, and was taken on appeal to the Privy Council, where the judgment was given which has been the subject of so much discussion, and which is insisted upon here by the plaintiff as a conclusive precedent in his favour.

Their Lordships in that case distinctly affirmed the well-known principle of law, that in this country, as in England, money recovered under a decree, or judgment, cannot be recovered back in a fresh suit so long as the decree, or judgment, under which it was recovered, remains in force. They go on to say that this rule of law rests upon the ground that the decree, or judgment, must be considered as subsisting, until it has been reversed, or superseded by some ulterior proceeding. But when it has been so reversed, or superseded, the money paid under it may be recovered back.

Their Lordships then go on to say that the decrees in this country under which the sum of Rs. 11,127-15-3 was recovered, were in fact superseded by the order of Her Majesty in Council in 1849. That order, they considered, extended not only to the claim of the plaintiff in the particular suit in which it was made, but to the adjustment of the rights and interests of the parties in the entire subject matter of that suit. The order had declared Doorga Persad to be a trustee for Tara Persad of the whole six-anna share of the bond and interest; and it had directed the Sudder Dewanny Adawlut to *adjust* and *enforce* the rights and liabilities of the parties in accordance with the directions of the Privy Council. If this order had been obeyed by the Sudder Dewanny Adawlut, as their Lordships say it ought to have been, the interest in question, Rs. 11,127-15-3, would have been refunded to Doorga Persad by the order of the Sudder Dewanny Adawlut, under and by force of their Lordships' previous decree; because that *decree* had *superseded* and

annulled what their Lordships call the "*dependent and subordinate decrees*" which had been obtained for the interest.

But, as the Sudder Dewany Adawlut failed to take any steps to carry out the directions of the Privy Council, their Lordships considered that the Rs. 11,127 were recoverable by a fresh suit; and they accordingly reversed the decree of the Sudder Court, and adjudged to the plaintiff that amount, with interest at 12 per cent.

Now, two things appear to me clear from this judgment:

1stly.—That the Privy Council had no intention of questioning the authority of the rule laid down in *Marriott vs. Hampton*. On the contrary, they distinctly affirm it, because they say that, as long as the decree, or judgment, under which money has been obtained, remains in force, no money paid under it can be recovered back; and 2ndly.—That their Lordship's judgment is based entirely upon this principle, *viz.*, that the effect of the order of Her Majesty in Council made in 1849 was not only to reverse the judgment in the case which was then *subjudice*, but also to supersede and annul, *ipso facto*, the decrees which had been made in another suit.

I have searched in vain to find any other instance in which the decree of an Appellate Court, in one suit has been held to have the legal effect of annulling or altering, *ipso facto*, a decree made by a Subordinate Court in another suit; but, of course, we are bound here to treat the decision of the Privy Council as binding upon us, as far as it goes, and to deduce as carefully as we can from the language of the judgment what was the ground upon which their Lordships considered that the order made in the first suit in 1849 had the effect of superseding the decree for the Rs. 11,127 interest.

It appears to me that the only explanation of the apparent difficulty is this, that, in the decree of 1849, their Lordships assumed to deal, and were in fact dealing, not only with the actual claim made in the suit, but with the status and rights of the parties with reference to the whole subject matter of it. They declared that Doorga Pershad was a Trustee of Tara Persad upon certain terms and conditions; and they directed the Court here to adjust the rights and liabilities of the parties in accordance with that declaration; and, as the interest of the bond (Rs. 11,127)

formed part of the fund in respect of which that trust had been declared, their Lordships considered that, although a decree had been obtained in the Courts here for the interest, that decree was as much dealt with and superseded by their judgment as the decree which had been made with reference to the remainder of the bond debt.

Upon this ground, and upon this ground only, it appears to me. their Lordships' judgment proceeded; and I do not understand that they intended to overrule the principle laid down in *Marriott vs. Hampton*, or to prescribe a different rule of equity in this country from that which obtains in England.

It does not appear to me that their decision can be considered as governing the present case, unless we can find that the decree made by their Lordships on the 25th of March 1873, reversing the first judgment for the enhanced rent, had the legal effect, *per se*, of superseding, or modifying, the subsequent decrees for enhanced rent, obtained between the year 1864 and the 25th of November 1875.

Now, on looking at the language of their Lordships in that decree, I cannot discover that they dealt, or intended to deal, with anything else than the actual subject matter of the suit upon which they were engaged.

Their judgment involves no change in the mutual relation of the parties. Their Lordships give no directions to the Courts of this country as to adjusting the parties' rights or liabilities. They simply decide the question, whether or not the plaintiff was entitled to enhance the plaintiff's rent; so that, unless we are to hold that in every case the decree of an Appellate Court has the effect of superseding, or modifying, every other decree inconsistent with it, which may have been made between the same parties in any other suit brought in a subordinate Court upon the same subject matter, I do not see how we can consistently say that the decree of the Privy Council of the 25th March 1873 has superseded, or modified, the subsequent decrees for enhanced rent obtained by the present defendant.

It will be observed that, in the case of *Doorga Persad* against *Tara Persad*, the decree which was superseded by the judgment of the Privy Council was for interest, which that judgment had declared not to be payable, and which their Lordships had in fact directed

the Privy Council, however, is referred to *George Bernard*; as that is the effect of Lord Kingsdown's order, according to the view which their Lordships took of it, was to supersede the decree for interest altogether.

But here the case is very different. Their Lordships here have given no direction which could have the effect of superseding or altering any other decrees and it is not contended that those subsequent decrees are *absolutely superseded*. It is said that they are only modified, or, in other words, that the Privy Council's judgment has had the effect, *per se*, of altering a judgment for one sum into a judgment for another sum.

But, if that is so, and if this principle is to be consistently carried out, the amounts of cost ought to be altered also.

This doctrine is certainly a novel one; and, if we are to apply it in all cases, as of course we must (if we are to act consistently), it will be attended with some strange consequences.

The rule, if it is to be applied in the case of one of the parties, must be applied also in the case of the other.

Thus, if in a suit like the present, a claim can be made by the tenant to recover sums which he has overpaid to the landlord, the landlord ought to have a corresponding remedy if the state of things were reversed.

Suppose that, in the original suit, the Courts here had decided that the landlord was not entitled to the enhanced rent, but the Privy Council overruled that judgment, and decided that he was so entitled; and suppose also that, pending the appeal to the Privy Council, the landlord had brought several suits for the enhanced rent, but, in each, had only recovered the original rent.—If the above principle is to be carried out, the landlord would be entitled, in a fresh suit, to recover the enhanced rent which he had failed to recover in his subsequent suits here, and to which the Privy Council had declared him entitled.

So, again, if the rule is to apply to cases of landlord and tenant, it must apply to all other cases where the relative rights of parties are determined in one suit, and claims founded on those suits. (The case of *Shama Persad vs. Tara Persad* was not a case between landlord and tenant).

Thus, for instance, A. sues B. to recover the value of coal which he claims as having been taken out of his coal mine. The question



depends upon whether B. has a right to take the coal from a particular area; and A obtains a decree for damages, upon the ground that B. has no such right. B. appeals to the High Court. Meanwhile B. continuing to take the coal, A. brings another suit against him for damages, and recovers. The High Court reverses the original decree. B. may then sue for the damages which he has paid in the second action, as money had and received to his use.

But, if this is to be law, the converse proposition ought to hold good also; that is to say, suppose the decree in the first suit to be in favour of B on the ground that B. had a right to get the coal, and A. brought another suit against B. and failed upon the same ground, the Court of Appeal reverses the first decree—surely A. ought to be entitled to recover by a fresh suit the value of the coal which was denied him in the second action.

It would be a palpable injustice to allow one party to avail himself of the judgment of the Appellate Court, and not the other.

In the case above-mentioned, the question as to the sum to be recovered would be tolerably simple. But, suppose, a case of this kind. A. sues B. for damages for building a house upon two pieces of land which he claims—Blackacre and Whiteacre. The question is whether B. has any right to do this. The Court decides that he has not, and awards damages to A. B. appeals. Meanwhile, the building still going on A brings a fresh suit for damages, which he has a right to do for the continuing trespass, and recovers further damages. The Court of Appeal reverses the first judgment in part, upon the ground that B. had a right to build on Blackacre, but not on Whiteacre; and reduces the damages accordingly. Can B. sue to recover *part of the damages* incurred in the second action? And, if so, what part? And how is the amount to be ascertained? In other words, to what extent, if at all, has the judgment of the Appellate Court *superseded*, or *altered*, the decree of the subordinate Court?

Then, again, it must be borne in mind that, if a decree of one Appellate Court is to have the effect of reversing, or altering, decrees in other suits, the same effect must be given to a decree of any other Appellate Court under similar circumstances. The decree of the Privy Council, as an Appellate Court, cannot have a different effect from that of the High Court, or the District Court, or the Court of the Subordinate Judge in its appellate capacity.

Thus, suppose that, in a suit by a landlord against a tenant for enhanced rent, the Moonsiff gives the plaintiff a decree. The case is appealed to the Subordinate Judge, who reverses the Moonsiff's judgment. Meanwhile, a second decree has been obtained, before the Moonsiff for the enhanced rent, and the tenant has paid the amount.

\* The tenant under these circumstances would be entitled, by force of the judgment of the Subordinate Judge, to recover from the landlord the amount which he has overpaid under the second decree.

But the landlord then takes the Subordinate Judge's judgment upon special appeal to the High Court; and the High Court reverses that judgment, and affirms the Moonsiff's.

The consequence would be that the landlord would be entitled to recover in a third suit the sum which he had previously recovered from the tenant on the second suit.

If this state of the law is to prevail in this country, it is difficult to see where litigation is to stop; or when people's rights are ever to be considered as finally determined.

If, in cases like the present, it is right that the English rule should be departed from at all, it appears to me that a review of judgment would be not only the most complete, but the most appropriate and unobjectionable, remedy; but this point we are not asked to decide by the present reference.

The only question before us is whether the present suit will lie, and I am strongly of opinion that it will not. I consider that it does not come within the principle of the case of *Shama Persad vs. Tara Persad*, decided by the Privy Council; and I cannot help deeply regretting the conclusion at which the majority of my learned brothers have arrived.

It is a conclusion directly opposed to what I consider a valuable and well-established rule of law; and I believe that it will be attended with most inconvenient and mischievous consequences.

The case will be sent back to the Division Bench for final disposal, and, speaking only for myself, I trust that the very serious question involved in the case may be taken up in appeal to the Privy Council.

*Jackson, J.*—I concur in this judgment.

## DIFFERENT KINDS OF MORTGAGES.

[*In continuation of page 260.*]

### GENERAL HYPOTHECATION—RIGHTS OF MORTGAGEE.\*

To go back. Every species of property, whether moveable or immoveable, which can be alienated, may be also the subject of mortgage, but it seems that a general hypothecation will not be recognised as valid by our Courts. (N. W. P., Vol. VII, p. 265 ; S. D. A., 1855, p. 353 ; compare 2 All., 263). The question, however, is not now of much practical importance, as no document which does not sufficiently specify the property comprised in it, can be registered, and a general hypothecation, therefore, cannot be created by registered instrument.

As regards the power to mortgage, it may be said that, generally speaking, a mortgage being a qualified alienation, the same rules which regulate the power to sell also regulate the capacity to mortgage. A detailed examination of these rules, which you will find in Mr. Justice Macpherson's treatise on Mortgages, would carry me much beyond the range of the present lectures. A doubt may, however, sometimes arise when trustees are empowered to sell, and no express power to mortgage is given. The law on the subject in England is that a trustee empowered to sell has presumably the right to mortgage, except when there is clear indication in the language of the instrument that no such authority was intended to be given. The question does not seem to have been ever distinctly raised in this country ; but there can be no doubt that if it should arise the point will be decided in the same way.

I shall now proceed to discuss the rights of the mortgagee, when the property pledged to him has received any accession, or undergone any alteration. The general law on the subject is that the creditor has not only a right against the property mortgaged to him, but also to any augmentation or increase. Thus, if a flock of sheep be mortgaged, the creditor acquires the same rights to any natural increase, as he has against the animals which composed the flock at the time of the mortgage. On the same principle, accessions to the mortgaged property by alluvion become subject to the mortgage. In some systems of law, the right of the mortgagee to whom land has been pledged extends to any buildings which may be subse-

\* Vide Tagore Law Lectures 1875-76, Lecture III by R. B. Ghose, pages 87 to 97.

quently erected by the debtor on the land. The right has not, however, so far as I am aware, been carried to a similar extent in India.

The right of the mortgagee will, however, not extend to anything which was never pledged to him, although it may be substituted in the place of the property originally pledged. Thus, to take a familiar instance from the Roman law, if a farm together with the slaves upon it be pledged, and the slaves die and are replaced by others, the right of the creditor shall not extend to the latter, except, as I have already said, where they are the issues of the deceased slaves.

This limitation of the right of the creditor however must not be confounded with cases in which the pledge is not actually destroyed, but to use the language of Sir James Colville, only "assumes a new form."

A question of considerable nicety on this point arose in the case of *Byjnath Lall v. Ramdin Chowdhry*, which was heard in the last resort by the Lords of the Judicial Committee of the Privy Council. In the case before the Privy Council, which was heard on an appeal from a decree of the Calcutta High Court, the facts were somewhat peculiar. It seems that the mortgagor Gopalnarain Dass was, when he executed the deed of conditional sale, which was the foundation of the plaintiff's title, the undisputed owner of an eight-anna undivided share in an estate consisting of three Asli mouzas called Gunniporebija, Pemburinda and Tajpore Ruttompore, to each of which certain Dakhila villages were appurtenant. There was no partition or division among the shareholders, and the interest of the mortgagor therefore in the whole estate was an undivided moiety. In this state of things Gopalnarain executed the mortgage, out of which the suit arose, of the whole and entire eight-anna of the whole 16 annas of Mouzas Gunniporebija and Pemburinda, expressly excepting from the deed the eight annas of Tajpore Ruttompore. It should seem that before the execution of the mortgage, application had been made by some of the cosharers of the mortgagor for a partition of the estate under Regulation XIX of 1814. A partition was made by the Collector, and the result was that, instead of an undivided moiety of the whole estate, the whole of Mouza Pemburinda, the whole of Tajpore Ruttompore, and whole of another mouza, a dependency of the third Mouza, Gunniporebija, were allotted to Gopalnarain, to be held by him in severalty. Shortly after the partition, Gopalnarain's rights

and interests in the mouzas, which fell to his share, were sold at execution sales, and purchased by certain persons, who were the substantial defendants, and who resisted the right of the plaintiff the mortgagee, to take anything under his mortgage deed in excess of the eight-anna share of the mouzas which had been mortgaged to him, the mortgagee insisting upon his right to the whole sixteen annas of the mouzas which had fallen to the share of the mortgagor in lieu of the undivided moiety which was held by the mortgagor at the time of the execution of the mortgage. The Court of first instance gave judgment in favor of the plaintiff, proceeding upon the principle that the mortgagee was entitled to whatever was allotted to the mortgagor on the partition in lieu of his undivided eight-anna share in the Mouzas Gunniporebija and Pemburinda, which was the subject of the mortgage. On appeal, however, to the High Court, the right of the mortgagee was limited to the share which was expressly named in and covered by the mortgage deed, i.e., only to an eight-anna of Mouza Pemburinda and an eight-anna share of Mouza Gunniporebija. The case then went on appeal to the Privy Council, and the Judicial Committee affirmed the decree of the first Court, and declared that the principle laid down by the first Court was correct. In giving the judgment of the Privy Council, Sir James Colvile is reported to have observed:—"Let it be assumed that such a partition has been fairly and conclusively made with the assent of the mortgagee. In that case, can it be doubted that the mortgagee of the undivided share of one co-sharer (and for the sake of argument, the mortgage may be assumed to cover the whole of such undivided share), who has no privity of contract with the other co-sharers, would have no recourse against the lands allotted to such co-sharers; but must pursue his remedy against the lands allotted to his mortgagor, and, as against him, would have a charge on the whole of such lands. He would take the subject of the pledge in the new form which it had assumed. In the present case there is not a suggestion of fraud, nor is there any ground to suppose that the partition was other than fair and equal. The mortgagee is content to accept what has been allotted in substitution of the undivided interest as the fair equivalent of it. Their Lordships are of opinion, not only that he has a right to do so, but that this, in the circumstances of the case, was his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-sharers. There is,

therefore, no question here of election, or of the time when the election was made." (21 W. R., p. 237; compare N. W. P., Vol. VIII, p. 669; S. D. A., 1857, p. 359.)

I shall now proceed to consider the validity of a power of sale contained in a mofussil mortgage. The question appears to have been for the first time raised in the case of *Bhawani Churn Mitter v. Joykissen Mitter*, heard before the late Sudder Dewany Adawlut of Calcutta in the year 1842, when the Judges were unanimously of opinion that a sale by the mortgagee under the power did not pass a valid title to the purchaser.

The decision has been criticised by Mr. Justice Macpherson in his work on Mortgages (pp. 45—47), and there is no doubt that some of the reasons given by the learned Judges will not bear examination. But the judgment of the Court substantially rests upon the broad ground that it would be inexpedient to allow the mortgagee in this country to exercise the power. It is true that such a power has been found beneficial in England, but English mortgagors as a class are perfectly competent to take care of their own interests. In India, however, we have to deal with a very different order of men. The mass of mortgages in this country consist of mortgages of ancestral fields by ignorant ryots to a class of people not remarkable for their scrupulousness, and any one having experience of Indian litigation, must admit the danger of arming our money-lenders with the right to sell the properties pledged to them without the intervention of a Court of Justice. As observed by the Court in *Bhowani Churn Mitter v. Joykissen Mitter*:—"This Court has only to declare such a condition legal, and in the course of a short time not a mortgage bond would be without it. The mortgagee would then sell his debtor's property to suit his own time, and in such manner and with such publicity and formalities as he thought proper. Fraud, it is to be feared, would frequently accompany the transfers, and the property fall into the hands of the mortgagee, or some of his connexions (even as in this case it is alleged the purchaser is the son-in-law of the mortgagee) at an inadequate price, leaving the lender at liberty still to pursue the borrower for the balance that may remain after the sale." (7 Select Reports, p. 429.)

With reference to the argument that the exercise of the power of sale was not unfair to the debtor, the learned Judges observe:—"It is urged for the plaintiff that the public sale of the mortgagor's property

cannot be a disadvantageous mode of proceeding towards the latter, that his property is sold to the highest bidder, and that if a surplus remains it belongs to himself. We have not to deal with abstract theories or bare possibilities, but with what experience and the principles of the Regulations furnish us, as our guides in the determination of a novel and unprecedented case. In a case of execution of a decree of Court, the proclamation of sale is an invitation to others interested to come and state their claims. If no claim is preferred, the title of the purchaser may generally be considered a pretty fair one. If claims are preferred, they are summarily investigated, and, should they appear fraudulent, are rejected; and in this case, too, the purchaser may generally be considered in a good position, as few are willing to incur the expense of a regular action on grounds already declared by a Court of Justice to be *prima facie* fraudulent. And yet, with all the formalities and securities of a transfer of real property by sale made by a Court of Justice, how frequent are the complaints that the property has been sold at an inadequate price, how much more frequent would they be, had not this Court held that inadequacy of price, at a regularly conducted sale, forms no ground for its reversal! If such be the case in such sales, the evils to be apprehended from permitting private individuals to sell their debtor's property, in satisfaction of their claims, must be ten-fold. But few purchasers at a fair price will be found, when in all probability, a lawsuit (as the order granting the review expresses it) will be tacked to the purchase. The object of the Regulation is to prevent improvident and injurious transfers of landed property at an inadequate price; the result of such a practice as that which the contract before us involves would be to render them universal." (7 Select Report, pages 440-41.)

It is true that the utmost latitude ought to be given to the parties to contract in any manner they please, but freedom of contract wears a very different aspect according as it is allowed to the English landowner or the Hindu ryot, and I am fortified in my view by the recommendation of the Indian Law Commissioners, who propose in their Sixth Report that a sale under a mortgage should in every case be conducted by the Court. (See also the observations of Melvill, J., in *Kesub Rao v. Bhowaneejee*, 8 Bom., p. 142.)

We have already seen that in most continental systems a sale without judicial process is absolutely void. Article 2078 of the

French Code says,—“The creditor cannot in default of payment dispose of the pledge, saving to him the power of procuring an order of the Court that such pledge shall continue with him in payment, and up to its due amount according to an estimate made by competent persons, or that it shall be sold by auction.”

“Every clause which shall authorise the creditor to appropriate the pledge to himself, or to dispose thereof without the abovementioned formalities, is void.”

You will remember that the French Code, equally with the other systems of law on the Continent, is largely shaped by the Roman law, and if the power which the Roman pledgee possessed has not been retained in those systems, it may fairly be presumed that the exercise of the power is not suited to every condition of society. But for the peculiar economic conditions under which land is owned in England, it may indeed fairly be doubted whether the system would have worked well even in that country. Be that, however, as it may, there can be no doubt that it would be dangerous to trust the Indian money-lender with a power which is so much liable to abuse.

## CALCUTTA HIGH COURT.

*The 23rd July and 12th September 1877.*

PRESENT :

The Hon'ble Sir Richard Garth, Kt., Chief Justice, and the Hon'ble Mr. Justice Jackson, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

SUGNA AJHA, (Defendant,) *Appellant*,

*versus*

MUSSUMMAT LUNGESSUR KOER, (Plaintiff,) *Respondent*.

*Special Appeal in Rent Suits—s. 102 of Act VIII (B.C.) of 1869.*

Held by Garth, C. J., and Macpherson, Markby, and Ainslie, J. J., (Jackson, J., dissenting), that, under s. 102 of Act VIII (B. C.) of 1869, no Special Appeal lies where the suit is a suit for rent (not exceeding Rs. 100) in which no question of right to enhance or vary the rent of a ryot or tenant, or any question relating to a title to land, or to some interest in land, as between parties having conflicting claims thereto, has not been determined by the judgment.

This was a reference to a Full Bench by the 2nd Divisional Bench of the Court, and the points in issue are fully stated in the order of reference which was as follows :—



*Mr. Justice Jackson.*—This is an appeal against a judgment of the District Judge of Sarun made on appeal against an original judgment of the Moonsiff of Chumparun in a suit brought by the plaintiff for recovery of Rs. 52 and 9 annas, principal with interest, being arrears of rent.

The Judge having reversed the decision of the Moonsiff, the plaintiff comes before us, on special appeal, and objection is taken on behalf of the respondents that under the provisions of Section 102 of Act VIII of 1869 B. C. no second appeal to this Court will lie, the suit being a suit for rent in which no question "of right to enhance or vary the rent of a ryot or tenant or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto, has not been determined by the judgment."

This section will undoubtedly apply, and inasmuch as the judgment under consideration is one, which unless restricted by provision of law we should certainly reverse, it is impossible to avoid considering the question whether the special appeal is in fact taken away by the section referred to.

The pleader for the respondent having submitted his objection, has not thought fit to support it by any argument, and has left it to us to dispose of without any assistance from him.

This matter is not new, because unquestionably number of appeals to this Court have been dismissed on this ground, the division bench before which the appeals came having considered the section a valid bar to special appeal. As at present advised, I myself and my brother White are both of us inclined to think that the section does not take away the appeal to this Court.

But as the contrary opinion has been repeatedly acted upon by this Court, we are bound to refer the case to a Full Bench, and as the matter will be fully argued there, it is only necessary to state briefly the reasons which make us think that the appeal is not taken away by the section in question.

The authority of this Court to entertain special appeals, and the right of suitors to prefer such appeals, are provided for by Section 372 of the Civil Procedure Code, which proves that "a special appeal shall lie to the Sudder Court from all decisions passed in regular appeal by the Courts subordinate to the Sudder Court, on the ground of the decision being contrary to some law or usage having

the force of law, or of a substantial error or defect in law in the procedure or investigation of the case which may have produced errors or defect in the decisions of the case upon the merits."

The Court which heard the regular appeal in the case now before us, is the Court of the District Judge, which is unquestionably a Court subordinate to the High Court, and therefore a special appeal will lie, unless any law for the time being in force provided otherwise. The provision relied on as taking away the special appeal is Section 102 of Act VIII of 1869 B. C. Now that section does not in express terms take away this power of special appeal, for it says, "Nothing in this Act contained shall be deemed to confer any power of appeal in any suit tried and decided by a District Judge originally or in appeal, if the amount sued for, or the value of the property claimed, does not exceed one hundred rupees, in which suit a question of right to enhance or vary the rent of a ryot or tenants, or any question relating to a title to land, or to some interests in land as between parties having conflicting claims thereto, has not been determined by the judgment."

I am clear that the special appeal given generally by Section 372 of Act VIII of 1859 cannot be taken away by implication, but by express provisions restricting the general rights, and even if we were of opinion that the Bengal Legislature intended to take away any right of special appeal, the question would arise whether that legislature under the powers conferred on it by the statute of 1861 could take away the jurisdiction of this Court.

Now in the very important case lately decided by this Court, (the *Queen versus Burah* and another), it was, I think, conceded on behalf of the Crown and assumed in the judgments delivered by the learned Judges, that the only authority which could take away the jurisdiction of the High Court was with the Governor-General in Council.

It was suggested by the vakeel for the appellant in this case that the class of suits to which the appeal belongs is a special class, relating to special subjects, and that it was the creation of the Bengal Legislature, and that therefore the right of appeal would not exist unless it was expressly provided for by the legislature which created it.

Suits for rent have been within the cognizance of Courts in British India ever since I believe the foundation of that empire, and between the years 1799 and 1859 subject to a double jurisdiction, that is to say, to the Court of the Collector and then by a sort of appeal to the Civil Court. By the Act of 1859 the double jurisdiction was abolished, and then suits for rent became cognizable by the Revenue Courts alone. But the Act (X) of 1859 made the orders of the Revenue Courts and also of the District Courts with a reservation subordinate to them subject to final appeal by the Sudder Court, and this Court when established undoubtedly inherited the jurisdiction of the Sudder Court. The effect of the latter enactment, Act VIII. of 1869 B.C. has been to throw rent suits into the great mass of litigation cognizable by the Civil Courts under the first Section of the Civil Procedure Code.

The present suit therefore being cognizable by the Civil Court, and being heard in appeal by a Court subordinate to the High Court, there is, I apprehend, nothing in Section 102 of the Bengal Act to take away the right of appeal, and such right can only be restricted by competent legislative authority.

This view is not new to me. I have often considered it, and in the case reported in XXI. W. R., p. 320, these doubts were intimated in these words in my separate judgment. "For this reason, I think that whatever exemption from appeal is conferred by that Section is limited to the decisions of District Judges." In saying that I left myself free for the future consideration of this question.

For these reasons I think that the efficacy of Section 102 ought to be referred for the decision of a Full Bench.

*Mr. Justice White.*—I concur.

The judgment of the Court was as follows :—

*Ainslie, J.*—By 24 and 25 Vic. C. 104, S. 9, the High Court is vested with all powers and authorities that may be conferred on it by Her Majesty's Letters Patent, and subject to the legislative control of the Governor-General in Council with all the then existing powers of the Sudder Dewani Adawlut.

By Section 15 of the Letters Patent of 1862 this Court was constituted a Court of Appeal from the Courts from which there was then an Appeal to the Sudder Dewani Adawlut, and was directed to exercise jurisdiction in such cases as were then subject to appeal to the Sudder Dewani Adawlut by virtue of any existing law or

which might thereafter be made subject to appeal by any law or regulation made by the Governor-General in Council.

By Section 16 of the Letters Patent of 1865, this Court is constituted a Court of Appeal from all Courts subject to its superintendence, and directed to exercise appellate jurisdiction in such cases as were then (in 1865) subject to appeal to it by virtue of any law or regulation then in force.

In 1861, 1862, and 1865 alike, there was at least one class of suits in which the Sudder Dewani Adawlut or the High Court had no power to interfere on special appeal, namely, the class of rent suits falling within the provisions of Section 153, Act X. of 1859. This Court neither inherited a power to interfere in such suits from the Sudder Dewani Adalat, which had not got it, nor took it as a new power under the first or second letters patent.

The words of the first charter "in such cases as are subject to appeal to the said Court of Sudder Dewani Adawlut" distinctly limit the appellate powers of this Court.

Under the second charter it can only be held that it gives a power of dealing in appeal with the class of cases now under consideration if it was given by the laws in force in 1865. The general law of appeal was Section 23, Act XXIII. of 1861; but this general law was rendered inoperative in certain cases by Section 153 Act X. of 1859, and as by this law there was no first appeal in certain cases. The Special Appeal Section (372, VIII., 1859) had nothing to operate upon.

By Section 33, Act VIII. of 1869 (Bengal Cl.) the jurisdiction of the Collectorate Courts was brought to an end, and all suits theretofore triable in such Courts were made triable by the ordinary Civil Courts, and by the next section it was provided that the procedure was to be regulated by the Code of Civil Procedure law, as in this Act might be otherwise provided.

The 102nd Section is one of those sections in which a different procedure is provided, and, therefore, unless Section 34 can be got rid of there can be no special appeal.

It seems to me that Section 372, VIII., 1859 does not override Section 34, Act VIII., 1869 (Beng. Cl.)

In order to introduce Section 372, VIII., 1859, it must be held that the provisions of Section 153, X., 1859, were based on the constitution of the Court from whose judgment the appeal was taken

away and not on the character of the suits in which it was forbidden.

Such a view seems to me to be distinctly negatived by Section 27, XXIII., 1861, as to which there can be no doubt that the character of the suits is the foundation of the law.

But if the limitation of appeals established by Section 153, X., 1859, of the Governor-General in Council affected suits, and was not in respect of Courts, then Section 372 is as much qualified by Section 113, Act X., of 1859 as it admittedly is by Section 27., XXIII., 1861, and the change of forum introduced by Act VIII. of 1869, has not the effects of removing the qualification.

Section 34, VIII. of 1869, as carried out by Section 102, left the jurisdiction of this Court intact, and, is therefore, not open to the objection that no legislative power except that of the Governor-General in Council can alter the jurisdiction of this Court.

If I entertained any doubt on the subject, I should feel bound by the long established and never before questioned (as far as I know) practice of the Court.

*Macpherson, J.*—In my opinion the questions, which have been referred to us, are concluded by the uniform course of the decisions of this Court ever since Act VIII. of 1869, B.C. came into force, and cannot now be re-opened.

Many thousands of suits under this Act have been disposed of annually, and this Court has never in any one of numerous appeals which have come before it in these suits, doubted the power of the Bengal Council to pass the Act. If the uniform course of our decisions during these many years is wrong, it seems to me that it is a matter for the Legislature, and that it is too late for us now for the first time to say that the Act was made without jurisdiction in so far as it touches the High Court as regards the right of appeal or otherwise.

As to the particular issue arising in Section 102, it seems to me also to be concluded by the numerous decisions of the Court\* (all taking the same view of the law) ending with the Full Bench case of *Brojo Misser* which was heard in March 1874 (13 B. L. R., 374) The question in that case was whether an additional Judge was a District Judge within the meaning of Section 102. The majority of

\* See for example 18 W. R. 102, 8 B. L. R. 180, and 188, 10 B. L. R. Ap. 29 and 30, 13 B. L. R. 377, 23 W. R., 171.

the Court held that he was, and therefore that under that section no appeal lay. Mr. Justice Jackson held that he was not, and therefore that the appeal did lie. But the report of that case does not show that any of the Judges doubted the effect to be given to Section 102, or conceived that in cases falling within that section there could be any appeal from the decision of the District Judge.

I consider that the matter referred to us has already been settled by these cases.

*Markby, J.*—I concur in the judgment of Mr. Justice Macpherson.

*Jackson, J.*—In answering on my part the question referred to the Full Bench, I have little to add to the reasons which I gave in referring this case. These reasons to my thinking have not been answered. It is suggested that the question raised here has been virtually decided by a long course of practice, and also by the ruling of the Full Bench in the case of Brojo Missioner against Mussamut Ablakhi Misra, and that we ought not, whatever our view might have been, if the question were now raised for the first time, to disturb such a course of practice. It seems to me, that although it is extremely desirable to maintain a long settled ruling in regard to matters on which the security of titles depends, or even where to arrive at a contrary decision would disturb the practice of inferior Courts, it is not necessary to do so in the present instance, where no man's title can be affected, nor can any possible inconvenience arise by the mere admission of the present appeal. It seems to me that in the first place the question has not been expressly raised and decided by a Full Bench, secondly that if as I think the law allows an appeal, we are not competent to deprive the appellant of his right merely out of deference to the practice of the Court; and thirdly, that to persist in an error merely because that mistake has been committed for seven years, is a course in which I am not prepared to concur. I would admit this Special Appeal.

*Garth, C. J.*—But for the long course of practice which has prevailed in this Court since the year 1869, and the Full Bench decision in the case of Brojo Misser *versus* Mussamut Ablakhi Misrani and others, 21, Weekly Reporter, 321, I should have been disposed to hold with Mr. Justice Jackson that a Special Appeal lay in a case like the present.

But I think it so extremely important that the rules of law prescribed by this Court should be settled and uniform; that I am unwilling to disturb a course of practice which as it seems to me has been confirmed by a Full Bench decision.

It is true that in that case the point now before us was not directly argued, because apparently it was not considered arguable, but the decision of it appears to me to have been involved in the Full Bench judgment, because the Court there held that under circumstances similar to the present, a Special Appeal does not lie from an Additional Judge to this Court, any more than from a District Judge.

That ruling does in my opinion virtually determine the question now referred to us.

The Special Appeal will, therefore, in conformity with the judgment of the majority of the Court, be dismissed with costs.

#### A COMMENTARY ON THE SPECIFIC RELIEF ACT.

A commentary on Act I of 1877 has lately been published by Baboo Boroda Prosonno Shome. The *Hindoo Patriot* in taking notice of this publication says:—"The plan followed is excellent. The scope of each section is explained; it is further elucidated with notes from legal textbooks bearing on the subject; sometimes it is followed by intelligent criticisms from the annotator suggested by his own judicial experience, and knowledge of the country. As the Specific Relief Act is too technical and not easily understood by the legal profession in the Mofussil, this commentary will be highly useful to them. Baboo Boroda Prosonno deserves great credit for the labor, research, and judgment, which he has brought to bear upon his work."

We fully indorse the above opinion and have no hesitation in recommending it to the legal public as a very valuable work, as will be seen from a perusal of the following extracts from it:—

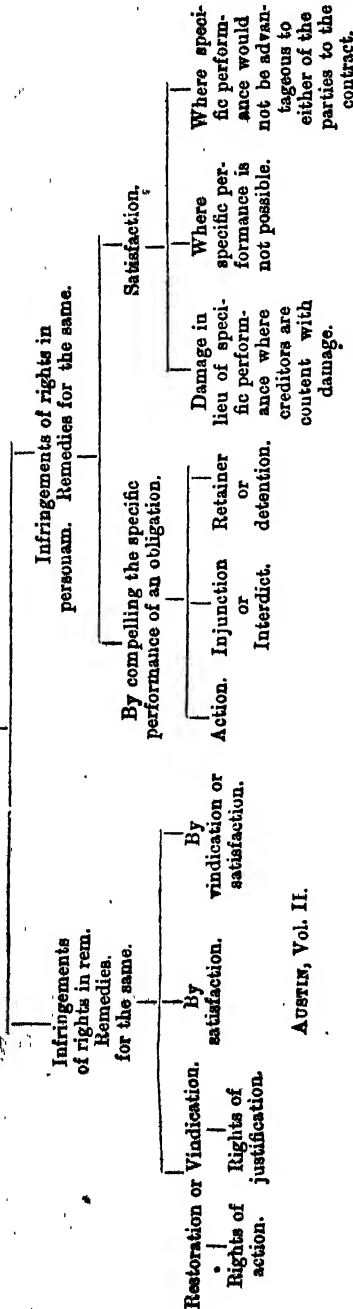
## "INTRODUCTION.

Of the three classes of rights, *viz.*, natural, moral, and legal, a protection of the last forms one of the chief duties of a good Gov-

ernment. A right then being the creature of Law, implies an obligation or sanction, and an obligation or sanction supposes an injury or wrong. In other words a wrong being the breach of an obligation by commission or omission, the ends of all sanctions or laws are, *1stly*, the prevention of injuries, and *2ndly* the redress of damages. Hence, every injury implies a remedy for "*ubi jus ibi remedium*" or there is no wrong without a remedy." Broom's Legal Maxims, p. 146; and a remedy corresponds to a right. As a legal right is either a *jus-in-rem* or a *jus-in-personam* each kind of right supposes a peculiar remedy for its breach. Hence remedies having reference to, infringement of rights in *rem* are, *1stly*, either restorative or vindicative, *2ndly*, by satisfaction, or *3rdly*, by both vindication and satisfaction, and in relation to rights in *personam* they are either by satisfaction or by specific performance of an obligation (*Vide* the marginal table by Austin.)

"It follows from the above premises that so long as the protective law of a country does not provide for all the modes

## DELICTS.



AUSTIN, Vol. II.



of relief it is fundamentally defective, and as an adjective participle in a sentence becomes of no use unless there be a substantive for its qualification, though the wholesome provisions of (Sections 93, 192, and 200 of) Act VIII of 1859, did by implication authorize the granting of specific relief in some cases, still it, in the absence of a substantive law specifying the breaches of rights and duties to be governed by it, was of little effect, and further being hampered by the technicalities of judicial decisions did in practice but very little good. Besides that Act contemplated and provided for a small area of relief. Hence the Specific Relief Act supplying what was heretofore a desideratum, its advantages cannot be too highly extolled. The introduction of such a Law is also supportable on general principles of Equity; for it is a maxim that 'Equity will not suffer a right to be without a remedy.' (1, Cru. Dig. X, 150; Smith's Manual of Equity, p. 10.) The Act consists of 3 parts. Part I explains certain terms and enunciates the different forms of relief as well as points out the cases, where Specific Relief cannot be had. Part II treats of the various forms of the restorative or vindicative relief, and Part III of preventive relief."

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## "PART II.

### OF SPECIFIC RELIEF.

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## CHAPTER I.

### OF RECOVERING POSSESSION OF PROPERTY.

"The right of possession must be distinguished from the right to possess. The right of possession is that right to possess, which begins from the fact of an adverse possession not beginning through violence. As regards all but the person whose right is exercised adversely the person who acquires the right of possession is clothed with the very right which he affects to exercise and as against the person whose right is exercised adversely he may acquire the very right through the title or mode of acquisition styled prescription. In other words, the *right of possession ripens by prescription into the right of dominion or property.*" (Austin's Jurisprudence).

(a.) *Possession of Immoveable Property.*

Property or dominion denotes literally a right independent in point of user, unrestricted in point of disposition and unlimited in point of duration over a determinate thing. In this sense it does not include a servitus which is a right to deal with or use in a given or definite manner a subject owned by another, *e. g.*, a right of way, a right of common (or of feeding one's cattle on land belonging to another) or a right of tithe (Austin vol. II, p. 820). In popular language however the distinction between a servitude and a dominion or property is not often maintained.

The word "immoveable property" signifies not only land but also "any interest arising out of land, and land comprehendeth any ground soil or earth whatever as meadows, pastures, woods, moors, waters, marshes, furzes, and heath." Co. Litt. 4a; 2 Blac. Com. p. 18. Immoveable property "includes land, incorporeal tenements and things attached to the earth or permanently fastened to any thing which is attached to the earth." (Act X of 1865, p. 12, Indian Succession Act) "Immoveable property includes land, building, hereditary allowances, rights to ways, lights, fisheries, ferries or any other benefit to arise out of land, things attached to the earth or permanently fastened to any thing which is attached to the earth, but not standing timber, growing crops, nor grass." (Act III of 1877, Indian Registration Act). Leasehold is immoveable property. *Ullman and others v. The Justices of the Peace for Calcutta* VII, B. L. R. App. 60. The interest of an heir according to the Hindu Law, expectant on the death of a widow in possession is not property (*Ram Chundra Tantra Das* VII, B. L. R. p. 34).

There may be property in a trade mark (*i. e.*,) an exclusive right to use it. *Smith's Manual of C. L.* p. 93. Again the right of advowson (which I suppose is equivalent to the right in Bengal of several mohunts to appoint the mohunt of a vacant gaddee) and the right of *borgha* or the right of the owner of a land of receiving a portion of the produce grown by the cultivators as well as the right to receive rent are all immoveable property. A chose in action generally *qua* chose in action is not property (*Chandra Kanta Bhattacharya* 1 B. L. R. Ac. 177).

A chose in action in respect of realty is immoveable property, but it is doubtful whether a chose in action in respect of chattels as

well as contracts come under the category of immoveable property. A chose in action for torts to person is not property per Phear, J., in Chandra Kanta Bhattacharya.

8. A person entitled to the possession of specific immoveable property may recover it in the manner prescribed by the Code of Civil Procedure.

(Sections 199, 223—24 of Act VIII of 1859) of (Sections 263 and 264 of Act X of 1877).

The term possession is to be understood as distinct from ownership or property. "Bare possession constitutes a sufficient title to enable the party enjoying it to obtain a legal remedy against a mere wrong-doer" (Austin vol. II, p. 820 *et se qua*; Jowlabaksh v. Dharm Singh, X. Moore's I. A., p. 528; Rajah Maheshnarayan Singh, IX. Moore's I. A., p. 324; Clarke v. Brindaban Chandra Sirkar, Marshall, p. 75.) Hence he who is in possession of an immoveable property though wrongfully as regards some particular individual, may maintain an action of trespass against all others (1 Blac. Com.) see also Dyson vs. Collins, 5 B. and Ald. 600 or Br. L. M. p. 292, footnote. Possession might be actual or constructive; thus, when immoveable property is let to another, the tenant has an actual and a landlord a constructive possession. In order to maintain an action under this section there *must be a right to immediate possession* of the property; hence a mortgagee of land cannot maintain an action against the occupier of land before a decree for foreclosure, Broom's Com., p. 766—67. Jageswar Singh, F. B. 1, I. L. R., p. 311; nor can a reversioner sue for possession during the continuance of a life-interest (Sarat Chandra Sen, 7 Suth. W. R., p. 303). In order to enable the real owner of property to recover from a purchaser for value from a person allowed by the real owner to hold himself out as the real owner he must prove either direct or constructive notice of the real title. Ramkumar Kunda, XI. B. L. R., p. 46 P. C.

9. If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit instituted within six months from the date of the dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit.

The fee chargeable in suits under this Section shall be half of that prescribed in the scale of fees for plaints mentioned in Schedule I, Article 1 of Act VII of 1870. Govt. Order No. 2127, dated 27th July 1877.

The former laws to the same effect were Act IV of 1840 and Act XIV of 1859, Sec. 15.

Three things are essential for the maintenance of an action under this section, *viz.*, *1stly*, that plaintiff must be in *actual possession at the time of dispossession* by the defendant. (This is the logical inference from the views expressed by Loch J. in Haradyal Bose, XVII, W. R., p. 70.) *2ndly*, dispossession without the plaintiff's consent. *3rdly*, dispossession by the defendant "otherwise than in due course of law." Actual possession is "where a person takes tangible and visible possession of a thing or enjoys the rents and profits of the same" per Stuart, C. J., in Jugeswar Singha F. B. 1 I. L. R. Allah. p. 311.

Hence no suit would lie under this section and in respect of immoveable property which is in the nature of an easement or other right of which the plaintiff cannot recover *actual possession* (Haradyal Bose, petitioner v. Krishna Gavinda Sen XVII. W. R., p. 70.) One argument against this view might be advanced on the ground that the word "immoveable property denotes an easement as well as land and must be supposed to have been used in the sense *here*, as in other sections of the Act; but the futility of the argument is obvious, for no suit can lie under this section in respect of a right of advowson (see defn. given above.) On the same principle it might be suggested that no suit can be maintained under this section by one co-sharer singly in respect of his share, against a person who evicts all the shareholders simultaneously from the possession of a joint property; for the share of one of several co-parceners being undefined and not specific he cannot recover actual possession of it. It is also to be borne in mind that no servant or other person, who is in charge of any property on behalf of his master and whose possession amounts to that of the former (Section 18 of Act XLV of 1860), can maintain an action under this section. The words "in due course of law" do not imply dispossession under colour of a legal process, and so it is doubtful whether A, being ousted from land *m* by B, in execution of a decree for land *n* against C, may not bring an action under this section against B, for a man whose possession is unlawfully invaded is not bound to give effect to that invasion because it is made under colour of a legal

process (*Mohan Dass v. Gavinda Dass* P. C. Suth. p. 644.) Besides the significant fact of the substitution of the preposition "in" in the present law for the word "by" in the former law (Section 15, Act XIV of 1859) does in my supposition support the view in favour of the maintenance of such a suit. It is however now a settled law that a person dispossessed in execution of a possessory decree against a third party can seek redress under section 230 of Act VIII of 1859 (*Brammamayee Deby v. Barkat Sinder* F. B. IV B. L. R. p. 94.)

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against the Government.

This is a novel proviso and is perhaps founded on the maxim "Rex. nonpotest peccari" or "The king can do no wrong" Broom's Legal Maxims, p. 40.

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

This is a reproduction of section 26 of Act XXIII of 1861. Hence this proviso does not militate against the general powers of superintendence vested in the High Courts, by the Statute XXIV and XXV. Vic. Cap. 104, section 16 of Charter of 1865 corresponding to § 15 of the Letters Patent of 1862.

(b.) *Possession of Moveable Property.*

Moveable property.—The words "Moveable property" are intended to include corporal property of every description, except land and things attached to the earth (*vide* Act XLV. of 1860, page 7.)

"Moveable property" includes standing timber, growing crops, grass, fruit upon and juice in trees and property of every other description except immoveable property. (Indian Registration Act III of 1877. Indian Council.)

Game killed on the land of A by a trespasser is A's property. Sm. Manual of C. L. p. 93. A thatch, especially when severed from the house, is moveable property (*Raj Kumar Mukherjea*

VII, B. L. R. app. 41) A hut is not moveable property (*Nattan Mia v. Nanda Ram* VIII, B. L. R. p. 508.)

10. A person entitled to the possession of specific moveable property may recover the same in the manner prescribed by the Code of Civil Procedure.

(Sec. 200 of Act VIII of 1859) or (S. 259 of Act X of 1877 the new Civil Procedure Code.)

A right to property (absolute or special) is distinct from a right to the possession of goods and, in order to support an action of trover, there must be a right to *property* as well as a right to possession. Br. Com. p. 791, 828. Thus a lessor cannot maintain an action of trover for the furniture of a house let to hire or demised to another if wrongfully taken by a third person (*Gordan v. Harper* T. T. R. 9 and Br. p. 791.) Where goods are bailed and the bailment is determined by the tortious act of the bailee (as by selling the goods) the property therein reverts at once to the bailor, so that he will be entitled to recover the goods or their value in trover even from a *bond fide* purchaser otherwise than in market overt *Bryant v. Wardell* 2 Exch. 479 Br. 828. "When goods have been wrongly removed an action of *trespass* may be maintained by the person who was in actual or had a constructive possession of them in respect of a vested right in them." Addison on Torts. 183, Br. Com. 121—2.

Possession might be actual or constructive, *e. g.*, in the case of an executor his right to the goods of the testator accrues immediately on his death, and such right draws after it a constructive possession "so that the executor may maintain trespass for goods of the testator taken between the death and grant of probates, as also the administrator will have the same remedy for goods taken between the death and the grant of letters of administration" (Br. Com. p. 797).

EXPLANATION 1.—A trustee may sue under this section for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled.

Thus a guardian of an infant under Act XL of 1858, or a manager of a Lunatic appointed under Act XXXV of 1858 may maintain an action for the possession of property under this sec-

tion; so a *shebait* of a Hindu idol or a *Mutwalli* of Mahomedan mosque may sue.

A Hindu widow is not a trustee. (*Huri Das Dutt v. Apoorna Dass*, 6 Moore's I A., p. 438; *Chundrabolly Debia v. Brody*, 9 W. R. p. 584).

**EXPLANATION 2.**—A special or temporary right to the present possession of property is sufficient to support a suit under this section.

(*Engleton v. The East India Railway Company*, VIII, B. L. R. p. 581). Hence if goods are taken from a bailee either he or the bailor may maintain trespass "per Parke B. in *Reg v. Vincent*, 21 L. J. M. C. 109." Thus a carrier may maintain trover against a stranger who takes the goods out of his possession; so also a factor, a ware-house-keeper, an auctioneer, pawnee, licensee, gratuitous bailee may sue (Br. Com. p. 826—27; Com. Digest Trespass, Story on Bail, 5th Edn, p. 124.)

*Illustrations.*—(a). A bequeaths land to B for his life, with remainder to C. A dies. B enters on the land, but C, without B's consent, obtains possession of the title deeds. B may recover them from C.

A trustee is entitled to have the muniments of title and in fact it is his duty to keep them in his possession (2 Sp. 46.)

(b). A pledges certain jewels to B to secure a loan. B disposes of them before he is entitled to do so. A, without having paid or tendered the amount of the loan, sues B for possession of the jewels. The suit should be dismissed, as A is not entitled to their possession, whatever right he may have to secure their safe custody.

(c). A receives a letter addressed to him by B. B gets back the letter without A's consent. A has such a property therein as entitles him to recover it from B.

(d). A deposits books and papers for safe custody with B. B loses them and C finds them, but refuses to deliver them to B when demanded. B may recover them from C, subject to C's right, if any, under section 168 of the Indian Contract Act, 1872.

(e). A, a warehouse-keeper, is charged with the delivery of certain goods to Z, which B takes out of A's possession. A may sue B for the goods.

11. Any person having the possession or control of a particular article of moveable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases :—

(a) when the thing claimed is held by the defendant as the agent or trustee of the claimant ;

“An agent” is a person employed to do any act for another, or to represent another in dealings with third persons (see Sec. 182 of Act X of 1872). Auctioneers, brokers and factors are agents. *Hazari Mall Nahatta*, IX, B. L. R. p. 1; *Baldeo Narayan v. Scrymgeour*, 6 B. L. R., p. 58. per Paul and Norman J. J. Under this comes the three classes of bailments, *viz.*, 1st when the trust is exclusively for the benefit of the bailor, 2ndly, when the trust is exclusively for the benefit of the bailee, and 3rdly, when the trust is for the benefit of both parties. This class includes tailors, pawn-brokers, carriers, (Br. Com. p. 804.) If a trustee conveys or assigns the trust property for valuable consideration in violation of the trust to a person who is aware of that circumstance or conveys or assigns it without valuable consideration, even that person will be treated as a trustee for the *cestuique trust* (see the notes under S. 10, Explanation I). An exception to this rule is in the case of goods pledged by the testator redeemed by the executors with thier own money ; for “there the law doth convert so much goods as amounts to that value in their property and give them leave to retain so much goods by way of allowance.” Bacon’s Maxims. Regula IX.

(b) when compensation in money would not afford the claimant adequate relief for the loss of the thing claimed ;

(c) when it would be extremely difficult to ascertain the actual damage caused by its loss ;

(d) when the possession of the thing claimed has been wrongfully transferred from the claimant.

*Illustrations*—Of clause (a)—A, proceeding to Europe, leaves his furniture in charge of B as his agent during his absence. B, without A’s authority, pledges the furniture to C, and C, knowing that B had



no right to pledge the furniture, advertises it for sale. C may be compelled to deliver the furniture to A, for he holds it as A's trustee.

For a purchaser of goods or chattels acquires no title (Smith's Manual of Com. Law. p. 158 ; Smith Man. of Equity.)

of clause (b), Z has got possession of an idol belonging to A's family, and of which A is the proper custodian. Z may be compelled to deliver the idol to A.

The rights of joint owners of an idol are discussed in Mitakanta Audhikari, XIV. B. L. R., p. 166.

of clause (c)—A is entitled to a picture by a dead painter and a pair of rare China vases. B has possession of them. The articles are of too special a character to bear an ascertainable market-value. B may be compelled to deliver them to A.

### CALCUTTA HIGH COURT.

*The 24th April 1877.*

#### PRESENT :

Mr. Justice Markby and Mr. Justice Prinsep.

Special Appeal, No. 1678 of 1875, from the decision of J. Tweedie, Offg. Judge of Burdwan, dated the 9th June, 1875, confirming a decree of Bahoo Gobind Chunder Ghose, Munsif of Bishtopore, dated 30th May, 1874.

SHIRO KUMARI DEBI\* (Defendant) *Appellant*,

*versus*

GOVIND SUAW TANTI (Plaintiff) *Respondent*.

*Declaration of Title—Adverse Possession—Case made in  
Plaint—Issues.*

A declaration of title may be made upon proof of twelve years' adverse possession. Such declaration cannot, however, be given on a title not distinctly stated in the plaint or in the issues.

*Tirumalasami Reddi v. Ramasami Reddi* † dissented from.

*Ram Lochun Chuckerbutty v. Ram Soondur Chuckerbutty* ‡ followed.

THIS was a suit for the confirmation of possession of, and the establishment of the plaintiff's jamai right in, 7 bigas of khera jamai lands, and for the setting aside an order and subsequent sale made in an execution-proceeding under s. 246 of the Co

\* *Vide* Indian Law Reports, 2. Calcutta Series p. 418.

† 3 Mad. H. C. Rep., 420.

‡ 20 W. R., 104.

of Civil Procedure. The plaint stated that the lands in question were portion of an estate which originally belonged to one Ram Dhoba, and that the said Ram Dhoba sold them under a khosh-kobala to one Lochunkali, from whom the plaintiff purchased the said lands under a kobala on the 14th Joist, 1269 (27th May, 1862), since which time the plaintiff had been in possession of the said lands through bhag tenants, by annually paying Rs. 7-14-15 as the rent thereof to the maliks. The second issue fixed by the Munsif and the only one now material, was, "whether the disputed land was held by Lochunkali by virtue of purchase, and is held by the plaintiff as alleged by him." The Munsif held the plaintiff entitled to the relief sought for, on the ground that he had proved his own possession, and that of his predecessor Ram Dhoba, for twelve years before the institution of the present suit. The Civil and Sessions Judge, after remanding the case for further evidence, dismissed the appeal by the defendant, on the ground that the plaintiff and his vendor Lochunkali had together enjoyed twelve years' actual possession of the disputed property before filing his present suit for the establishment of his right and title, and was therefore, entitled to a decree.

The defendant preferred a special appeal to the High Court.

*Markby, J.*—This is a suit brought under the provisions of s. 246 of the Code of Civil Procedure for setting aside an order made in an execution-proceeding taken in respect of certain land, of which the plaintiff claims to be the owner. He put in a claim under s. 246, and failed; and thereupon he brought this suit, to use the words of that section, "to establish his right." He sets out his title saying that the land of which he claims to be the owner appertained to 23 bigas 11 cottas 7 chittaks of land which belonged to one Ram Dhoba; that out of the said land, Ram Dhoba sold 7 bigas, which are in dispute, to Lochunkali; that while Lochunkali was in possession of the said land, he sold it to the plaintiff under a kobala of the 14th Joist, 1269. "Since then I have been in possession of the same through bhag tenants, by annually paying Rs. 7-14-15 as the rent thereof to the maliks. To this there was no objection offered by any body."

Various issues were raised; and one of those issues, or rather part of one of those issues, is this,—Is the disputed land held by the plaintiff as alleged by him? Ultimately, after a remand,

the Lower Appellate Court was not satisfied that the plaintiff had established the precise title which he had set up, but it was satisfied that he had been in possession for twelve years; and upon that ground gave him the declaration which he asked.

Now, in the first instance, it was broadly contended before us, that, in a suit of this kind, no declaration of the plaintiff's title can be made merely upon twelve years' possession; and in support of that, a decision of the Madras High Court, *Tirumalasami Reddi v. Ramasami Reddi* (1) was relied on. With the general proposition there laid down, I must say I am unable to agree: it is in direct conflict with a decision of this Court in *Ram Lochun Chuckerbutty v. Ram Soondur Chuckerbutty* (2)—the decision of Sir Richard Couch and Mr. Justice Glover, wherein it is laid down in the most distinct terms that a declaration of title may be made upon proof of twelve years' possession. Sir Richard Couch says:—"What the plaintiffs sought was a declaration of title to this share in the land, and the first Court had given them that. They having been in possession of the land for more than twelve years, the title of any other person had been, to use the language of the Judicial Committee in the case of *Gunga Gobind Mundul v. The Collector of the 24-Pergunnahs* (3), extinguished in their favour. The effect of their possession was to extinguish other titles, if any existed; and we think, in a suit of this kind, although they failed to satisfy the Court that their title to the land had been acquired in the way they stated, if in fact they are entitled to it, they ought to have a declaration to that effect, and not be driven to bring another suit in which they would omit any statement of the manner in which they became entitled, and simply say that they were entitled to it, and that they had been in possession of it for a greater number of years, more than sufficient to bar all other claimants by the law of limitation, and ask for a decree on that ground."

It appears to me that if we look to the reason of the thing, we could come to no other conclusion. The plaintiff comes into Court, as for this purpose we must assume that he has a right to come, to prove his title. There is no reason whatever why

(1) 6 Mad. H. C. Rep., 420. (2) 20 W. R., 104,

(3) 11 Moore's I. A., 345.

he should not prove his title by any mode which will show that he has a good title, and when once the law has declared that twelve years' possession is a good title by itself, I do not see how it is possible that the Court can refuse to recognize that, any more than it can refuse to recognize a conveyance from a previous owner.

Then it is said that there are decisions of this Court in which a contrary view has been taken. The decisions relied on are: *Moulvi Abdoollah v. Shaha Mujeesooddeen* (1), *Court of Wards v. Radhapershad Sing* (2), *Bijoya Debia v. Bydonath Deb* (3), *Bhaygo Mutty Bibee v. Mahomed Wasil* (4). Now it is possible that there may be some conflict between the two last of those decisions and the decision of Sir Richard Couch, to which I have already referred, upon one point. Sir Richard Couch clearly thought that if the question of twelve years' possession was properly raised in the issues, the suit ought not to have been dismissed although the title had not been based upon that ground in the plaint. Possibly, I do not say that it is so, possibly there may be a conflict between the two last decisions and the decision of Sir Richard Couch upon that point; but we need not consider that, because I do not think that, upon the two important points which arise in this case, there is any conflict between the decision of Sir Richard Couch in *Ram Lochun Chuckerbutty v. Ram Soondur Chuckerbutty* (5) and the other decisions. I think, on the one hand, there is nothing which contradicts the decision of Sir Richard Couch, that a possession for twelve years is a good title upon which a declaration may be based; and on the other hand, I think, Sir Richard Couch clearly admits, what the other decisions expressly lay down, that the question of twelve years' possession must be raised in the issues. I think that appears from what Sir Richard Couch says, when dealing with the judgment of Sir Barnes Peacock, in the case of *Ram Coomar Shome v. Gunga Pershad Sein* (6). He says there:—"The nature of the case, as appears from the papers," (that is, speaking of the papers of the case before Sir Barnes Peacock) "did not admit of the plaintiff's asking for what has been given to the plaintiff in this case by the first Court, namely, a declaration that he is the person entitled to the land."

(1) 16 W. R., 27.

(2) 23 W. R., 238.

(3) 24 W. R., 444.

(4) 26 W. R., 315.

(5) 20 W. R., 104.

(6) 14 W. R., 109.

It is precisely on that ground that the cases of *Bijoya Debia v. Boydonath Deb* (1) and *Bhaygo Mutty Bibee v. Mahomed Wasil* (2), are distinguishable from the decision in the case of *Ram Lochun Chuckerbutty v. Ram Soondur Chuckerbutty* (3). In the case of *Bijoya Debia v. Boydonath Deb* (1), Sir Richard Garth says: "This decision," speaking of the decision of the Court below in that case, "appears to us to be entirely beside the plaintiff's real claim and the issues which have been raised, and properly raised, in the Court below;" and so Mr. Justice Macpherson says in the case of *Bhayga Mutty Bibee v. Mahomed Wasil* (2): "The Lower Appellate Court ought not to have given a decree in favour of the plaintiff upon a ground which is not suggested in the plaint, or in the issues tried." It is quite clear that when a plaintiff claims a title upon twelve years' possession, he must draw the attention of the defendant to the fact that he is going to claim a declaration upon that title, in order that the defendant may give his own evidence and scrutinize the evidence of the plaintiff upon that point, and see whether possession for twelve years is proved, and whether he can contradict it during any portion of that period. I think, therefore, it is clear how we ought to deal with this case. We ought, on the one hand, to hold that the plaintiff may have a declaration of his title based on twelve years' possession, but that if he wishes to claim a declaration upon a title of that kind, he must at least clearly raise that question in the issues in the case. Now, therefore, we must examine what are the issues raised in this case. Some issues were raised by the District Judge on appeal, and were remanded to be tried by the Munsif. I am not at all clear what new points the District Judge desired to have tried, but this is immaterial, because the new issues contain nothing about twelve years' possession. We need only, therefore, look at the issues as settled in the first Court. As I have already shown, the form of the issue there was whether the disputed land was held by the plaintiff as alleged by him? The issue, therefore, refers us back to the allegations in the plaint, and no question can arise in this case as to what would be the result if the issues disclosed a new title.

(1) 24 W. R., 444.

(2) 25 W. R., 315.

(3) 20 W. R., 104.

Now let us turn to see what the allegation in the plaint is. When we come to look at the allegation in the plaint, I think it is not sufficiently clearly stated that the plaintiff intended to rely upon twelve years' possession. In fact, the plaintiff says that he has not been himself in possession for much more than eleven years, and though he is, no doubt, entitled to join the possession of his vendor to his own possession, yet he has not given the date when his vendor came into possession, nor does he even make the general allegation that the possession of his vendor, coupled with his own possession, would amount to a period of twelve years. It follows that the question of twelve years' possession has not been properly raised either in the plaint or in the issues in this case, and the defendant had no proper notice that such a point was going to be raised; therefore, it was not open to the Lower Appellate Court, having negatived the title which has been alleged by the plaintiff, to declare in his favour a title which had not been alleged. For those reasons I think that the decision of the Lower Appellate Court is wrong, and it ought to be reversed, and the plaintiff's suit dismissed.

I only wish to add that it is not necessary for us now to consider whether we ought to interfere in this case on the ground that the suit ought not to have been remanded. But I think it right to say that, as far as I can see, there was no ground upon which a remand ought to have been directed in this case. The plaintiff had had an opportunity of proving his title, but he had failed to do so; and having failed to do so, I think the Lower Appellate Court ought to have dismissed the suit, and not to have given the plaintiff an opportunity of producing any further evidence.

The suit will be dismissed, and the appellant will be entitled to her costs in this Court and in the Courts below.

I think it desirable to add that, in this judgment, I do not express any opinion as to whether a declaration can be given upon a title which appears in the issues but is not set forth in the plaint. I only say that a declaration cannot be given on a title not distinctly stated either in the plaint or in the issues.

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## PRIVY COUNCIL.

*The 12th July 1877.*

## PRESENT:

Sir J. W. Colville, Sir Barnes Peacock, Sir Montague E. Smith  
and Sir Robert P. Collier.

*Appeal from Calcutta High Court.*

ADMINISTRATOR-GENERAL OF BENGAL, (Plaintiff) *Appellant*,  
*versus*

JUGGESSAR ROY and others, (Defendants) *Respondents*.

*Fraud—Misrepresentation—Concealment.*

A transaction will not be set aside merely on the ground of inadequacy of consideration, unless the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition.

*Tennent vs. Tennent*, Law Rep., 2 Scotch Appeals, 6, cited and followed.

The judgment of their Lordships is as follows:

This suit was instituted by Mr. Robert John Jackson, who upon his death has been succeeded on the record by the present plaintiff, for the purpose of setting aside certain conveyances by him to the three first defendants of his interest in Mouzah Luchhipore, in the district of Ranigunge, on the ground, in the first place, that he was under age, and in the second place, that he was induced by the defendants, who were trusted servants, but who had abused their fiduciary character, to part with his property without fully understanding the nature of the transaction, and without adequate consideration. Mr. Robert John Jackson was the adopted son of a Mr. Robert Gwynne Jackson (who will be called Mr. Gwynne Jackson), who appears to have been of European extraction. The date of his adoption is one of the questions in the cause, the plaintiff alleging the adoption to have been about the year 1855, and the defendants as far back as 1850. Mr. Gwynne Jackson appears to have resided a great number of years in the neighbourhood, and to have been well acquainted with coal mining. He, in 1860, was the manager of the coal mines of Messrs. Apar and Company, who, it may be observed by the way, entered into an agreement with Jackson, the plaintiff, to supply him with funds for prosecuting this suit, in consideration of, in the event of his succeeding, his granting them a coal lease.

Mr. Gwynne Jackson left the employment of Messrs. Apar and Company in 1860, on account of their being dissatisfied with

him, but he continued afterwards up to about 1867 to some extent in their employment in a subordinate capacity, when he finally left it. He appears to have acquired some property, and to have been interested in other coal mines in the neighbourhood.

Shortly before the year 1860, which is the first date material in this case, Mr. Gwynne Jackson bought certain putnee and durputnee rights, including the coals in Mouzah Luchhipore, partly from the defendants. It is not disputed that by a deed, bearing date the 20th September 1860, he, being such putneedar and durputneedar, granted certain sub-tenures by way of durputnee and seputnee, reserving the minerals to three of the defendants; but one question in the cause has been, whether that deed was executed at the time it bears date, or at a later date not very clearly indicated on the part of the plaintiff, but which the Judge in the Court below has found to be the year 1869.

Gwynne Jackson made a will in 1868, leaving all his property to his son. Subsequently in 1863 he executed a *hibba*, which would have the effect of revoking that will, giving all his property, some of which had been acquired since the date of the will, to his son, and in fact denuding himself of all his property, if that *hibba* is to be taken as intended by him to be then operative.

The deeds, the subject of this suit, were executed in 1870 and 1871, and the last in 1872. These deeds may be divided into two classes. One class is that in which the plaintiff confirms the durputnee and seputnee rights, which were dealt with by the deed bearing date the 20th September 1860; the other class of deeds, which bear date in 1871, and one of them as late as June 1872, are deeds of sale, whereby he transfers all the superior interest which he had, together with the minerals which had been reserved in the former deeds.

With respect to one of the main questions in this case, which has been already indicated, namely, whether the conveyance, bearing date the 20th day of September 1860, was executed then or at a subsequent date, their Lordships have intimated in the course of the argument, that, on the whole, they concur with the finding of the High Court that that deed must be taken to have been executed at the time when it bears date. If that be so, being prior in time to the *hibba*, it is unaffected by that instrument, and the subsequent deed of 1870, being merely confirmatory of it, and conferring on the defendants no



greater interest than they took under it, is obviously of no importance, and may be allowed to stand with it.

The question remains whether the deeds of 1871 and 1872, conveying, as has been before stated, the remaining and superior interest, together with coals, are to be set aside on any of the grounds which have been alleged. With respect to this point their Lordships also intimated, during the course of the argument, that they saw no sufficient reason to differ from the conclusion of the High Court that the plaintiff had failed to sustain the burden of proof which lay upon him that he was a minor at the time of the execution of these deeds.

The question then arises, in the first place, whether it has been shown that the three first defendants (for it should be stated that the two last defendants are the sub-lessees under them) were in a fiduciary capacity or character to the plaintiff at the time of the execution of these deeds, and were therefore in a position to exercise undue influence over him. Upon this question their Lordships also have come to the same conclusion as the High Court. There is indeed some evidence that Haradhun Misser, the father of Juggeswar Misser, and the two Roy defendants, were at times employed in collieries in which Gwynne Jackson had a share; and there is also some evidence of the latter having acted as his gomashtras with respect to the property comprised in the deed of 1860, but the decision which their Lordships have come to, concurring with the High Court, on the subject of this deed, in a great measure disposes of this class of evidence. Their Lordships see no reliable evidence on the record that, at the time of the execution of these documents by the plaintiff, they were in any fiduciary character *quoad* him, or in a position unduly to influence his judgment. If that be so, the question is narrowed to whether a fraud was practised upon him.

It is contended, in the first place, that the nature of the transaction was misrepresented to him; that the defendants represented to him that he was not parting with his mining rights by these deeds, whereas he was, and that the deeds were not explained to him; further, that the sale price was inadequate.

With respect to the deception so alleged to have been practised upon him, the only evidence to be found of it is the evidence of the plaintiff himself, and that evidence is described as untrustworthy

by the learned Judge of the inferior Court, who found in the plaintiff's favour. There is no confirmatory evidence of this, and there is contradictory evidence to the effect that the deed was read over and explained to him, and that he understood the language in which it was written.

The question then reduces itself to whether there was such an inadequacy of price, as to be a sufficient ground of itself to set aside the deed. And upon that subject it may be as well to read a passage from the case of *Tennent v. Tennent* (2nd Law Reports, Scotch Appeals, p. 9,) in which Lord Westbury very shortly and clearly stated the law upon this subject. He says: "The transaction having been clearly a real one, it is impugned by the appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration, but it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition."

Their Lordships are unable to come to the conclusion that the evidence of inadequacy of price is such as to lead them to the conclusion that the plaintiff did not know what he was about, or was the victim of some imposition. It should be borne in mind that his father Mr. Gwynne Jackson was at hand, and their Lordships concur with the view of the High Court that Mr. Gwynne Jackson, by the *hibba* of 1863, did not intend to denude himself of all his property in favour of his son, whom he represents at that time to have been eight years old, and who could not have been more than twelve or thirteen. It probably was a device for the purpose of defeating existing or possibly future creditors. Gwynne Jackson himself acted in contravention of that deed, for he sold a property soon after its date without any reference to it, and there is evidence that he continued to act as if he were the owner of the property. Gwynne Jackson was very conversant with coal-mining and the character of property in the district, and their Lordships are not satisfied that he was unable to manage his own affairs, or to give competent advice to his son until the year 1872, in the early part of which he was admitted to an hospital with an incurable disease, of which he died in about the middle of that year. He had granted his property to his son by a *hibba*, intending nevertheless to keep in

his hands the control of it through his life, but very probably intending it to operate after his death in favour of his son. His son no doubt had an interest in the property as well as himself, and probably the true view of these transactions in 1870 and 1871 is that they were in substance joint transactions by the father and the son. Their Lordships cannot, therefore, regard the son at these dates as altogether in the position of a minor without any one to advise him. It may be observed that the deed in 1872 was but the completion of the previous transactions.

Independently, however, of this consideration, it cannot, their Lordships think, be said that the purchase-money was so grossly inadequate that its inadequacy amounts to proof of an imposition upon the plaintiff. It is true that there is some evidence, the value of which it is difficult precisely to estimate, that property with coal sold in the neighbourhood for some years' purchase greater than the number of years' purchase for which this property sold, which was with respect to a portion of it twelve years' purchase, and with respect to another portion of it ten years' purchase, and there is evidence, which perhaps is the strongest on this part of the case, that soon after the purchase by the defendants, they let a portion of this property on mining leases at a considerable rental, or more, properly speaking, royalty. It should be observed, however, that these leases give the power to the lessee to terminate them at any time, and *non constat* how long the high rental would continue.

It has been suggested that the defendants must have known that there was coal under the land, and that they concealed their knowledge from the plaintiff. Even if it were so, putting aside their fiduciary character, and in the absence of any proof of fraud, that would not be enough or vitiate the transaction; but in point of fact their Lordships can find no evidence of this. All the evidence is the other way, namely, that they did not discover the coal until after they had made the purchase; and it may be observed that Gwynne Jackson himself had tried for coal without being able to discover it. It appears, therefore, to their Lordships that this last ground on which it is sought to impeach the validity of the deeds also fails.

On the whole, therefore, their Lordships are of opinion that the High Court was right in affirming the validity of these deeds and dismissing the plaintiff's suit; and they will therefore humbly

advise Her Majesty that the judgment of the High Court be affirmed and this appeal dismissed, with costs.

## CALCUTTA HIGH COURT.

*The 6th August 1877.*

PRESENT :

Mr. Justice Jackson and Mr. Justice McDonell.

In the matter of KOOKOR SINGH, *Petitioner.*

*Code of Criminal Procedure, Section 505—Bad livelihood—Charge—  
Notice of precise matter proved—Witnesses—Bail.*

A person against whom proceedings for bad livelihood have been taken is entitled to have embodied in a charge the precise matter which the Magistrate considers established by evidence against him. It is not sufficient to say generally that there is suspicion.

He should be asked to produce his witnesses, or offered assistance to procure their attendance.

He should be admitted to bail. A Magistrate is not competent to refuse bail unless the law sanctions such refusal.

This was an application to the High Court, as a Court of Revision, to set aside an order of the Magistrate of Dinagepore, requiring the petitioner to give security for good behaviour under Section 505 of the Code of Criminal Procedure.

JACKSON, J.—We have considered the Magistrate's further proceedings in the case of Kookor Singh, charged under Section 505, Code of Criminal Procedure.

It appears that, on receipt of the orders of the Division Court quashing the previous decision in his case, Kookor, being released, was immediately re-arrested and placed on bail by the Joint Magistrate on the 18th May.

The Magistrate ordered on the 21st that the case should be heard on the following day, and accordingly on the 22nd the accused was further examined.

The questions put to him were: Whether he had witnesses touching the charge against him, to which he answered that he had. Whether he had anything to answer as to the suspicion against him, to which he answered that he was at enmity with the Darogah and with Joynarain. What quarrel he had with the Darogah?

*Answer* : That quarrel related to his demand of the price of some articles of food supplied, which price the Darogah had not paid. Whether his witnesses were in attendance? *Answer* : They are not. Why he had not brought them? *Answer* : They will not come at my request. Whether he had applied for *tulub* (meaning the Magistrate's process) on them? *Answer* : No. Whether he had filed a nominal roll (*ismnavisi*) of them? *Answer* : No. Whether he had any objection to give security? *Answer* : My quarrel with the Darogah. Whose ryot he was? *Answer* : Names his landlord.

The order (of same date) on this is that the accused do remain in *Hajut* (lock up) till 4th June.

A note in the English language signed by the Magistrate, no doubt, says that Kookor Singh is remanded "for such evidence as he can bring," but there is nothing to show that he (Kookor) was made aware of the Magistrate's object or intention in making the order.

Manifestly he was neither asked who his witnesses were, nor whether he now desired the assistance of the Court, though he had already stated that the witnesses would not attend without process. On the day appointed, a pleader appeared on the prisoner's behalf and tendered a list of 16 witnesses for the defence, but the Magistrate, observing that the case had stood over long enough, refused to allow any further adjournment, and, overruling certain objections advanced by the Pleader, made the order now complained of.

Taking this order by itself, *i. e.*, without reference to former proceedings in the case, it appears to us open to the following serious objections :—

1. The accused has really no notice of the precise charge on which he is brought before the Magistrate. He is entitled unquestionably to have the precise matter, which the Magistrate considers established by the evidence against him, embodied in a charge. It is not sufficient to say generally that there is suspicion.

2. The accused was, by the Magistrate's procedure, absolutely deprived of the means of defending himself. He was not told that he was to produce his witnesses, or offered assistance in procuring their attendance, or even asked who they were, and when he made application by a Pleader his request was refused on the ground that it was made too late, although he had not been warned to make it before.

3. The accused was without authority of law, put in *Hajut* or close custody, pending the final hearing. The Magistrate justifies this on the ground that the charge is cognizable by the Police. This is no more decisive of the question than is the rule in Section 515 that the evidence is to be taken as in summons cases. The Magistrate is not competent to refuse bail unless the law expressly sanctions the refusal, and it is clear that when the Magistrate, by his final order in the case, has no power to commit the accused to prison except in case of his failure to give bail, he cannot do so, except in the like case pending enquiry.

The illegal order thus made was calculated, and has the appearance of being intended to cripple the accused as to his defence.

It is manifest, therefore, that the petitioner has not had a fair trial, and he is entitled to have the order quashed. These irregularities, however, assume a still more serious character when considered with what had taken place before in the case of the petitioner.

It appears that a previous order of the same Magistrate, based on the very same evidence and enquiry, had been set aside by an order of this Court on the ground set out in Judge's letter or memo. of 12th July.

It might have been expected, therefore, that in dealing further with the case, the Magistrate would have been specially careful to avoid the errors pointed out by the Division Bench.

Instead of this, the errors are repeated with an additional illegality; and the proceedings unfortunately shew not the slightest trace of a desire to afford the accused those advantages to which every person on his trial is entitled.

It is right to add that we are not favorably impressed by the evidence on which the Magistrate based his order, and consequently we see no reason to think that the release of Kookor Singh will lead to a failure of justice.

Magistrates, who act in the manner exemplified in this case, ought to bear in mind that they not only violate their duty as judicial officers bound to do justice indifferently, but even contravene their own object, as administrative officers, by rendering the supposed offenders objects of sympathy, as well as by ensuring their escape at any rate for the moment. The order is quashed.

## CALCUTTA HIGH COURT.

*The 6th December 1877.*

## PRESENT :

Mr. Justice Markby and Mr. Justice Mitter.

SREEMUTTY GOLUCK MONY DEBIA and others

(Decreeholders) *Appellants*,*versus*MOHESH CHUNDER MOSA (Judgment-Debtor) *Respondent*.*Rent Decree for less than 500 rupees—Act VIII (B. O.) of 1869.**Section 58—Limitation—Application for Execution—**Fresh Application.*

The true construction of Act VIII (B.C.) of 1869, Section 58, is that execution shall not issue unless a proper application for execution is made within three years from the date of the judgment.

*Rhedoy Krishna Ghose vs. Koylash Chunder Bose*, 13 W. R. (F.B.) 3, cited and followed.

*Lalla Ram Sahoo vs. Dodraj Mahto*, 20 W. R., 395, dissented from.

Circular Order of the 10th of July 1874, discussed.

A rent decree was passed against the respondent, in favor of the appellant, on the 31st of January 1873. A general application for execution, both against the person and property of the debtor, was made and granted on the 5th July 1875.

The question in the case was: Whether the granting of this application would warrant the decree-holder in proceeding by successive steps, at one time against the property, and at another time against the person of the judgment-debtor, without making a fresh application.

*Markby, J.*:—In this case we think that the decision of the Moonsiff and of the District Judge was wrong, and that execution ought to have been allowed to issue. The decree was dated the 31st January, 1873, and was a decree for arrears of rent. On the 5th July 1875, the decree-holder applied for execution by arrest and by attachment and sale of the property of the judgment-debtor. On the 22nd of September 1875, the decree-holder informed the Court that the judgment-debtor had made a proposal for a compromise, and that it was not necessary that he should be arrested. Subsequently, he applied for attachment of the judgment-debtor's property; and, on the 15th of March 1876, that application was

disallowed on the objection of the judgment-debtor, upon the ground that under the Rent Law his property could not be attached until other steps were taken. Immediately upon this, the judgment-creditor made an application for the arrest of the judgment-debtor.

Now the Full Bench have laid down, in a case reported in 13 W. R., 3, F. B.; 4 B. L. R., 82, F. B.—*Rhedoy Krishna Ghose vs. Koylas Chunder Bose* (and that decision is binding upon us)—what the true construction of the section (58, Act VIII (B. C.) of 1869) is, which imposes a term of limitation of three years upon a judgment-creditor when applying for execution. The effect of that decision is stated in the judgment of Mr. Justice Macpherson, who says that “the words should be considered as meaning that execution shall not issue unless a proper application for execution is made within three years from the date of the judgment. That I understand to be the decision of the majority of the judges of the Full Bench. That being so, the real question which we have to determine in this case is, whether the proceeding of the 17th March 1876 was a new and substantive application for execution, or whether it was merely a step taken by the judgment-creditor in furtherance of the execution for which he applied, and applied successfully, on the 6th July 1875. Now, one of the facts to be noticed in this case is, that the proceeding, which took place on the 17th of March 1876, and subsequent proceedings, were all under the original number which was borne by the proceedings of 1875. I do not say that that was conclusive in the matter; but it certainly goes to show that the proceedings, which followed upon the application of the 17th March 1876, were not proceedings upon a new execution then for the first time issued, but steps taken in furtherance of the original application. Under all the circumstances of this case, we think that we are justified in saying that the steps taken for the arrest of the judgment-debtor in March 1876 were not new proceedings, but a continuation of the old proceedings. If that be so, then, according to the Full Bench decision, it is incumbent upon us to hold that they are not barred.

The District Judge has relied upon the terms of a Circular Order\* of this Court. We do not at all wish to weaken the effect

\* Note.—In this Circular the Court intimated that in such cases “the same process of execution cannot be executed more than once, and directed that the reception of supplementary lists of property to be attached, or other devices by which the provisions of Section 58, Act VIII (B. C.) of 1869, are evaded, may be at once put a stop to.”—13 B. L. R., 62, High Court Rules, &c.



of any thing which is stated in that Circular Order. That Circular Order does not, and could not, affect the law as laid down by the Full Bench decision. Notwithstanding anything which is contained in that Circular Order, the question must be decided in the same way, *viz.*, by enquiring whether the application for execution, upon which proceedings were had, was made within three years from the date of the decree.

The vakeel for the respondent has also relied upon a decision in 20 W. R., 395—*Lalla Ram Sahoo vs. Dodraj Malho*. All that is necessary for us to say upon that decision is this, that the question of delay on the part of the judgment-creditor is nowhere referred to by the Full Bench. It may be that the question of delay on the part of the judgment-creditor may, in some cases, be useful in assisting the Court to determine whether an ambiguous proceeding is a fresh application for execution, or a step taken in furtherance of a previous application. But there is nothing which will authorize us to import into the law of limitation, the question of diligence on the part of the judgment-creditor as a substantive portion of that law.

We think that the decision of the District Judge must be set aside, and the money deposited by the judgment-debtor must be paid out to the decree-holder. The decree-holder will be entitled to his costs in this Court and in the Courts below.

## CALCUTTA HIGH COURT.

*The 6th December 1877.*

PRESENT :

Mr. Justice Ainslie.

RAKHALDAS BANDOPADHYA (Defendant) *Appellant*,  
*versus*

INDRU MONEE DEBI (Plaintiff) *Respondent*.

*Adverse possession — Co-sharer — Limitation — Secondary Evidence.*

When one co-sharer sets up as against another adverse possession of land which had previously been waste, but at some former time had been occupied and then been admittedly held jointly, it is for him to show that he has held possession in such a way as to give distinct notice to his other co-sharers of his intention to set up a title adverse to them.

Secondary evidence of a document should not be admitted unless the absence of the original is sufficiently accounted for.

**AINSLIE, J.**—With reference to the question of limitation I think that the Subordinate Judge is right.

For the purpose of determining that question it must be assumed that the allegations of title were true. The Subordinate Judge has found that the plaintiff and defendant were jointly in possession, and jointly realized rents from the tenants who squatted on the land before it became waste more than twelve years ago. So long as any profit was derivable from the land, they jointly had the benefit of it. When the land became waste, their joint ownership and possession were not in any way interfered with. It must be taken that their possession continued as before until something was done to alter the position of the parties in respect of each other. When one co-sharer sets up as against another adverse possession of land which had previously been waste, but at a former time had been occupied and had then been admittedly held jointly, it is for him to show that he has held possession in such a way as to give distinct notice to his other co-sharers of his intention to set up a title adverse to them.

Now, even supposing the possession of the defendant to have been in its nature adverse, the Subordinate Judge has found on the evidence that it did not run far enough back to interfere with the right of the plaintiff to recover, so that he (plaintiff) must be presumed to have carried on the original possession during the time that the land lay wholly waste and unoccupied up to a period within twelve years of the institution of the suit.

The second ground of appeal, however, seems to be one to which effect must be given. It is that, whereas the plaintiff relies upon a title founded on a patni, created by an instrument in writing, it was not open to him to ask the Court to receive any evidence of the nature of the grant, except the writing itself, until the absence of that writing had been sufficiently accounted for.

The plaintiff has clearly not sufficiently accounted for the absence of the patni lease. He stated that he believed it to be in the hand of one of the defendants, and caused that person to be summoned to produce it. The defendant did not produce it, and stated that it was not with him. It does not appear on the record that the plaintiff took any sufficient steps to cause the document to be brought into Court if still in existence, nor is there any thing from which the Court might reasonably infer that the document is no longer in existence and incapable of being produced. Under

these circumstances, the question whether the plaintiff held under a patni lease or not cannot be determined on the oral evidence. It has been said that oral evidence of possession is sufficient to enable the plaintiff to recover, if the Court will infer from it the existence of his patni title. No doubt in some cases possession is taken to be evidence of an underlying but uncertain title ; but in such cases possession must have run on up to the time of the alleged ouster from which the suit takes its origin. In this case active visible possession terminated many years ago, though within twelve years of the institution of the suit. For the purpose of the first issue—the issue of limitation on the assumption of the existence of a patni title—possession may be taken to have been continuing, throughout the time when the land lay waste, in those who actually enjoyed it when the land was formerly occupied ; but, when we come to the question of title, there is no presumption at all that a title continues, or that the actual exercise of the rights conferred by it ceases otherwise than by forcible interruption. Unless the patni can be established, there is nothing to show that the possession of the plaintiff was founded on such a title as would give rise to the presumption on which the finding on the issue of limitation is based. He may have been holding under a title which terminated at the same time as the active enjoyment of the property came to an end.

Therefore, on the second ground, I think that the order of the Subordinate Judge must be reversed, and the judgment of the First Court affirmed. The appeal is allowed with costs.

## PRINCIPLES OF THE INDIAN PENAL CODE.

[ *As explained by the original framers and laid before the Governor-General in Council in the year 1837.* ]

### *Note A. (Continued)*

#### ON THE CHAPTER OF PUNISHMENTS.

\*\*\*\* The offender may be imprisoned, till the fine is paid ; or he may be imprisoned for a certain term, such imprisonment being considered as standing in place of the fine. In the former case the imprisonment is used in order to compel him to part with his money. In the latter case the imprisonment is a punishment substituted for another

punishment. Both modes of proceeding appear to us to be open to strong objections. To keep an offender in imprisonment till his fine is paid is, if the fine be beyond his means, to keep him in imprisonment all his life. And it is impossible for the best judge to be certain that he may not sometimes impose a fine which shall be beyond the means of an offender. Nothing could make such a system tolerable, except the constant interference of some authority empowered to remit sentences : and such constant interference we should consider as in itself an evil. On the other hand to sentence an offender to fine, and to a certain fixed term of imprisonment in default of payment, and then to leave it to himself to determine whether he will part with his money, or lie in gaol, appears to us to be a very objectionable course. The high authority of Mr. Livingston is here against us. He allows the criminal, if sentenced to a fine exceeding one-fourth of his property, to compel the judge to commute the excess for imprisonment at the rate of one day of imprisonment for every two dollars of fine, and he adds that such imprisonment must in no case exceed ninety days. We regret that we cannot agree with him. The object of the penal law is to deter from offences, and this can only be done by means of inflictions disagreeable to offenders. The law ought not to inflict punishments unnecessarily severe. But it ought not, on the other hand, to call the offender into council with his judges, and to allow him an option between two punishments. In general the circumstance that he prefers one punishment raises a strong presumption that he ought to suffer the other. The circumstance that the love of money is a stronger passion in his mind than the love of personal liberty is, as far as it goes, a reason for our availing ourselves rather of his love of money than of his love of personal liberty for the purpose of restraining him from crime. To look out systematically for the most sensitive part of a man's mind, in order that we may not direct our penal sanctions towards that part of his mind, seems an injudicious policy.

We are far from thinking that the course which we propose is unexceptionable. But it appears to us to be less open to exception than any other which has occurred to us. We propose that, at the time of imposing a fine, the Court shall also fix a certain term of imprisonment which the offender shall undergo in default of payment. In fixing this term the Court will in no case be suffered to exceed a certain maximum, which will vary according to the nature

of the offence. If the offence be one which is punishable with imprisonment as well as fine, the term of imprisonment in default of payment will not exceed one-fourth of the longest term of imprisonment fixed by the Code for the offence. If the offence be one which, by the Code, is punishable only with fine, the term of imprisonment for default of payment will in no case exceed seven days.

But we do not mean that this imprisonment shall be taken in full satisfaction of the fine. We cannot consent to permit the offender to choose whether he will suffer in his person or in his property. To adopt such a course would be to grant exemption from the punishment of fine to those very persons on whom it is peculiarly desirable that the punishment of fine should be inflicted, to those very persons who dislike that punishment most, and whom the apprehension of that punishment would be most likely to restrain. We therefore propose that the imprisonment which an offender has undergone shall not release him from the pecuniary obligation under which he lies. His person will, indeed, cease to be answerable for the fine. But his property will for a time continue to be so. What we recommend is that, at any time during a certain limited period, the fine may be levied on his effects by distress. If the fine is paid or levied while he is imprisoned for default of payment, his imprisonment will immediately terminate, and if a portion of the fine be paid during the imprisonment, a proportional abatement of the imprisonment will take place.

It may perhaps appear to some persons harsh to imprison a man for non-payment of a fine, and after he has endured his imprisonment to take his property by distress in order to realize the fine. But this harshness is rather apparent than real. If the offender, having the means of paying the fine chooses rather to lie in prison than to part with his money, his case is the very case in which it is most desirable that the fine should be levied, and he is the very convict who has least claim to indulgence. The confinement which he has undergone may be regarded as no more than a reasonable punishment for his obstinate resistance to the due execution of his sentence. If the offender has not the means of paying the fine while he continues liable to it, he will be quit for his imprisonment. There remains another case, that of an offender who, being really unable to pay his fine, lies in prison for a term, and within six years after his sentence acquires property. This case is the only case in which

it can with any plausibility be maintained that the law, as we have framed it, would operate harshly. Even in this case, it is evident that our law will operate far less harshly than a law which should provide that an offender sentenced to a fine should be imprisoned till the fine should be paid. Under both laws imprisonment is inflicted, under both a fine is exacted. But the one law liberates the offender on payment of the fine, and also fixes a limit beyond which he cannot be detained in gaol whether the fine be paid or no. The other law keeps him in confinement till the money is actually paid. It is therefore at least as severe as ours on his property, and is immeasurably more severe on his person.

In fact we treat an offender who has been sentenced to fine more leniently than the law now treats a debtor either in England or in this country. By the English law an insolvent not in trade is kept in confinement till he has surrendered all his property; till he has answered interrogatories respecting it, till the Court is satisfied that he has paid all that he can pay. Even when his person is liberated his future acquisitions still continue to be liable to the claims of his creditors. The law throughout British India is in principle the same with the law of England. The offender who has been sentenced to fine must be considered as a debtor, and as a debtor not entitled to any peculiar lenity. It will be difficult to shew on what principles a creditor ought to be allowed to employ, for the purpose of recovering a debt from a person who is perhaps only unfortunate, a more stringent mode of procedure than that which the State employs for the purpose of realizing a fine from the property of a criminal. If a temporary imprisonment for debt ought not to cancel the claim of the private creditor, neither ought a temporary imprisonment in default of payment of a fine to cancel the claims of public justice.

It is undoubtedly easy to put cases in which this part of the law will operate more severely than we could wish; and so it is easy to put cases in which every penal Clause in the Code would operate more severely than we could wish. This is an evil inseparable from all legislation. General rules must be framed; and it is absolutely impossible to frame general rules which shall suit all particular cases. It is sufficient if the rule be, on the whole, more beneficial than any other general rule which can be suggested. Those particular cases in which a rule generally beneficial may operate too harshly must

be left to the merciful consideration of the Executive Government. We are satisfied that the punishment of fine would, under the arrangement which we propose, be found to be a most efficacious punishment in a large class of cases. We are satisfied that if offenders are allowed to choose between imprisonment and fine, fine will lose almost its whole efficacy, and will never be inflicted on those who dread it most.

Closely connected with these questions respecting the punishment of fine is another question of the highest importance, which indeed belongs rather to the law of civil rights and to the law of procedure than to the penal law, but respecting which we are desirous to place on record the opinion which we have formed after much reflection and discussion.

In a very large proportion of criminal cases there is good ground for a civil as well as for a penal proceeding. The English law, most erroneously in our opinion, allows no civil claim for reparation in cases where injury has been caused by an offence amounting to felony. Thus a person is entitled to reparation for what he has lost by petty fraud, but to none if he has been cheated by means of a forged bill of exchange. He is entitled to reparation if his coat has been torn; but to none if his house has been maliciously burned down. He is entitled to reparation for a slap on the face, but to none for having his nose maliciously slit, or his ears cut off. A woman is entitled to reparation for a breach of promise of marriage; but to none for a rape. To us it appears that of two sufferers he who has suffered the greater harm has, *cæteris paribus*, the stronger claim to compensation; and that of two offences that which produces the greater harm ought *cæteris paribus*, to be visited with the heavier punishment. Hence it follows that in general the strongest claims to compensations will be the claims of persons who have been injured by highly penal acts; and that to refuse reparation to all sufferers who have been injured by highly penal acts is to refuse reparation to that very class of sufferers who have the strongest claim to it.

We are decidedly of opinion that every person who is injured by an offence ought to be legally entitled to a compensation for the injury. That the offence is a very serious one, far from being a reason for thinking that he ought to have no compensation, is *prima*

fact a reason for thinking that the compensation ought to be very large.

Entertaining this opinion, we are desirous that the law of criminal procedure should be framed in such a manner as to facilitate the obtaining of reparation by the sufferer. We are inclined to think that an arrangement might be adopted under which one trial would do the work of two. We conceive that, in every case in which fine is part of the punishment of an offence, it ought to be competent to the tribunal which has tried the offender, acting under proper checks, to award the whole or part of the fine to the sufferer, provided that the sufferer signifies his willingness to receive what is so awarded in full satisfaction of his civil claim for reparation. If the Criminal Court shall not make such an award, or if the sufferer shall not be satisfied with such an award, he must be left to his civil action. But if, in such an action, he recovers damages, the fine ought, in our opinion, to be employed, as far as the fine will go, in satisfying those damages.

The plan we propose would not be open to the strong and indeed unanswerable objections which Mr. Livingston has urged against the plan of blending a civil and criminal trial together. Yet we think it likely that our plan would in a great majority of cases render a civil proceeding unnecessary. We are happy to be able to quote the high authority of Mr. Livingston in favour of the doctrine that every fine imposed for an offence ought to be expended, as far as it will go, in paying any damages which may be due in consequence of injury caused by that offence.

This course seems to be the only course consistent with justice to either party. It is most unjust to the man who has been disabled by a wound, or ruined by a forgery, that the Government should take, under the name of fine, so large a portion of the offender's property as to leave nothing to the sufferer. In general, the greater the injury the greater ought to be the fine. On the other hand, the greater the injury the greater ought to be the compensation. If, therefore, the Government keeps whatever it can raise in the way of fine, it follows that the sufferer who has the greatest claim to compensation will be least likely to obtain it. By empowering the Courts to grant damages out of the fine, and by making the fine after it has reached the treasury of the Government answerable for the



damages which the sufferer may recover in a Civil Court, we avoid this injustice.

Nor is this arrangement required only by justice to the sufferer. It is also required by justice to the offender. However atrocious his crime may have been; he ought not to be subjected to any punishment beyond what the public interest demands. And we depart from this principle if, when a single payment would effect all that is required both in the way of punishment and in the way of reparation, we impose two distinct payments, the one by way of punishment and the other by way of reparation.

The principles on which a Court proceeds in imposing a fine are quite different from those on which it proceeds in assessing damages. A fine is meant to be painful to the person paying it. But civil damages are not meant to cause pain to the person who pays them. They are meant solely to compensate the plaintiff for evil suffered. They cause pain undoubtedly to the person who has to pay them. But this pain is merely incidental; nor ought the amount of damages at all to depend on the degree of depravity which the wrong-doer has shewn, except in so far as that depravity may have increased the evil endured by the sufferer. If A, by mere inadvertence, drives the pole of his carriage against Z's valuable horse, and thus kills the horse, A has committed an action infinitely less reprehensible than if he kills the horse by laying poison secretly in its food. The former act would probably not fall at all under the cognizance of the Criminal Courts. The latter act would be severely punished. But the payment to which Z has a civil claim is in both cases exactly the same, the value of the horse, and a compensation for any expense and inconvenience which the loss of the horse may have occasioned. That A has committed no offence is no reason for giving Z less than his full damages; that A has committed a most wicked and malignant offence is no reason for giving Z more than his full damages. If a mere inadvertence cause a great loss, the damages ought to be high. If the most atrocious crime cause a small loss the damages ought to be low. They are fixed on a principle quite different from that according to which penal laws are framed and administered.

Here then are two payments required from one person on account of one transaction. The object of the one payment is to give him pain, and the amount of that payment must be supposed to be

sufficient to give him as much pain as it is desirable to inflict on him in that form. The object of the other payment is not at all to give pain to the payer, but solely to save another person from loss. It does, indeed, incidentally give pain to the payer; but it is not imposed for that end, nor is it proportioned to the degree in which it may be fit that the payer should suffer pain. Surely under such circumstances justice to the payer requires that the former payment should, as far as it will go, serve both purposes, and that if, in the very act of enduring punishment he can make reparation, he should be permitted to do so.

We have now said all that we at present think it necessary to say respecting the punishments provided in the Code. It may be fit that we should explain why some others are omitted.

We have thought it unnecessary to place incapacitation for office, or dismissal from office, in the list of punishments. It will always be in the power of the Government to dismiss from office and to exclude from office even persons against whom there is no legal evidence of guilt. It will always be in the power of the Government, by an act of grace, to admit to office even those who may have been dismissed. We therefore propose that the power of inflicting this penalty shall be left in form, as it must be left in reality, to the Government.

We also considered whether it would be advisable to place in the list of punishments the degrading public exhibition of an offender on a pillory after the English fashion, or on an ass in the manner usual in this country. We are decidedly of opinion that it is not advisable to inflict that species of punishment.

Of all punishments this is evidently the most unequal. It may be more severe than any punishment in the Code. It may be no punishment at all. If inflicted on a man who has quick sensibility it is generally more terrible than death itself. If inflicted on a hardened and impudent delinquent, who has often stood at the bar, and who has no character to lose, it is a punishment less serious than an hour of the treadmill. It derives all its terrors from the higher and better parts of the character of the sufferer: its severity is therefore in inverse proportion to the necessity for severity. An offender who, though he has been drawn into crime by temptation, has not yet wholly given himself up to wickedness and discarded all regard for reputation, is an offender with whom it is generally desirable to deal

gently. He may still be reclaimed.\* He may still become a valuable member of society. On the other hand the criminal for whom disgrace has no terrors, who dreads nothing but physical suffering, restraint, and privation, and who laughs at infamy, is the very criminal against whom the whole rigour of the law ought to be put forth. \*To employ a punishment which is more bitter than the bitterness of death to the man who has still some remains of virtuous and honorable feeling, and which is mere matter of jest to the utterly abandoned villain, appears to us most unreasonable.

If it were possible to devise a punishment which should give pain proportioned to the degree in which the offender was shameless, hard-hearted, and abandoned to vice, such a punishment would be the most effectual means of protecting society. On the other hand of all punishments the most absurd is that which produces pain proportioned to the degree in which the offender retains the sentiments of an honest man.

This argument proceeds on the supposition that the public exposure of the criminal has no other terrors than those which it derives from his sensibility to shame. The English pillory, indeed, had terrors of a very different kind. The offender was, even in our own time, given up with scarcely any protection to the utmost ferocity of the mob. Such a mode of punishment is, indeed, free from one objection which we have urged against simple exposure; for it is an object of terror to the most hardened criminal. But it is open to other objections so obvious that it is unnecessary to bring them to the notice of his Lordship in Council. That the amount of punishment should be determined, not by the law or by the tribunals, but by a throng of people accidentally congregated, among whom the most ignorant and brutal would always on such an occasion be the most forward, would be a disgrace to an age and country pretending to civilization. We take it for granted that the punishment which we are considering, if inflicted in any part of India subject to the British Government, would consist in degrading exposure and nothing more. That punishment, we repeat, while it would be a mere subject of mockery to shameless and abandoned delinquents, would, when inflicted on men who have filled respectable stations and borne respectable characters, be so cruel that it would become justly more odious to the public than the very offences which it was intended to repress.

We have not thought it desirable to place flogging in the list of punishments. If inflicted for atrocious crimes with a severity proportioned to the magnitude of those crimes, that punishment is open to the very serious objections which may be urged against all cruel punishments, and which are so well known that it is unnecessary for us to recapitulate them. When inflicted on men of mature age, particularly if they be of decent stations in life, it is a punishment of which the severity consists, to a great extent, in the disgrace which it causes; and, to that extent, the arguments which we have used against public exposure apply to flogging.

It has been represented to us by some functionaries in Bengal that the best mode of stimulating the lower officers of Police to the active discharge of their duties is by flogging, and that since the abolition of that punishment in this Presidency, the Magistrates of the lower provinces have found great difficulty in managing that class of persons.

This difficulty has not been experienced in any other part of India. We, therefore, cannot, without much stronger evidence than is now before us, believe that it is impracticable to make the Police Officers of the lower provinces efficient without resorting to corporal punishment. The objections to the old system are obvious. To inflict on a public servant who ought to respect himself and to be respected by others, an ignominious punishment which leaves an indelible mark, and to suffer him still to remain a public servant, to place a stigma on him which renders him an object of contempt to the mass of the population, and to continue to intrust him with any portion, however small, of the powers of Government, appears to us to be a course which nothing but the strongest necessity can justify.

The moderate flogging of young offenders for some petty offences is not open, at least in any serious degree, to the objections which we have stated. Flogging does not inflict on a boy that sort of ignominy which it causes to a grown man. Up to a certain age boys, even of the higher classes, are often corrected with stripes by their parents and guardians; and this circumstance takes away a considerable part of the disgrace of stripes inflicted on a boy by order of a Magistrate. In countries where a bad system of prison-discipline exists, the punishment of flogging has in such cases one great advantage over that of imprisonment. The young offender is not exposed even for a day to the contaminating influence of an ill

regulated gaol. It is our hope and belief, however, that the reforms which are now under consideration will prevent the gaols of India from exercising any such contaminating influence; and, if that should be the case, we are inclined to think that the effect of a few days passed in solitude or in hard and monotonous labor would be more salutary than that of stripes.

Being satisfied, therefore, that the punishment of flogging can be proper only in a few cases, and not being satisfied that it is necessary in any, we are unwilling to advise the Government to retrace its steps, and to re-establish throughout the British territories a practice which, by a policy unquestionably humane and by no means proved to have been injudicious, has recently been abolished through a large part of those territories.

The only remaining point connected with this Chapter to which we wish to call the attention of his Lordship in Council is the provision contained in Clause 61. This provision is intended to prevent an offender whose guilt is fully established from eluding punishment on the ground that the evidence does not enable the tribunals to pronounce with certainty under what penal provision his case falls.

Where the doubt is merely between an aggravated and mitigated form of the same offence, the difficulty will not be great. In such cases the offender ought always to be convicted of the minor offence. But the doubt may be between two offences neither of which is a mitigated form of the other. The doubt, for example, may lie between murder and the aiding of murder. It may be certain, for example, that either A or B murdered Z, and that whichever was the murderer was aided by the other in the commission of the murder. But which committed the murder, and which aided the commission, it may be impossible to ascertain. To suffer both to go unpunished, though it is certain that both are guilty of capital crimes, merely because it is doubtful under what Clause each of them is punishable, would be most unreasonable. It appears to us that a conviction in the alternative has this recommendation, that it is altogether free from fiction, that it is exactly consonant to the truth of the facts. If the Court find both A and B guilty of murder, or of aiding murder the Court affirms that which is not literally true: and in all occasions, but especially in judicial proceedings, there is a strong presumption in favor of literal truth. If the Court finds that A has either murdered Z. or aided B to murder Z, and that B has either

murdered Z or aided A to murder Z, the Court finds that which is the literal truth; nor will there, under the rule which we have laid down, be the smallest difficulty in prescribing the punishment.

It is chiefly in cases where property has been fraudulently appropriated that the necessity for such a provision as that which we are considering will be felt. It will often be certain that there has been a fraudulent appropriation of property; and the only doubt will be whether this fraudulent appropriation was a theft or a criminal breach of trust. To allow the offender to escape unpunished on account of such a doubt would be absurd. To subject him to the punishment of theft, which is the higher of the two crimes between which the doubt lies, would be grossly unjust. The punishment to which he ought to be liable is evidently that of criminal breach of trust. But that a Court should convict an offender of a criminal breach of trust, when the opinion of the Court perhaps is that it is an even chance or more than an even chance that no trust was ever reposed in him, seems to us an objectionable mode of proceeding. We will not, in this stage of our labors, venture to lay it down as an unbending rule that the tribunals ought never to employ phrases which, though literally false, are conventionally true. Yet we are fully satisfied that the presumption is always strongly in favor of that form of expression which accurately sets forth the real state of the facts. In the case which we have supposed the real state of the facts is that the offender has certainly committed either theft or criminal breach of trust, and that the Court does not know which. This ought, therefore, in our opinion, to be the form of the judgment.

The details of the law on this subject must, of course, be reserved for the Code of Procedure. But the provision which directs the manner in which the punishment is to be calculated appears properly to belong to the Penal Code.

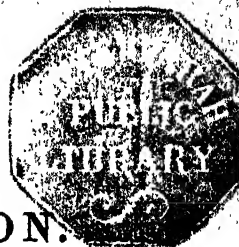
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MANDAMUS—*defined.*

MANDAMUS is the name of a writ, issuing, in the Queen's name, from the court of Queen's Bench, directed to any person, corporation, or inferior court, requiring them to do some specified act which appertains to their office and duty. It is a high prerogative writ, of a most extensive remedial nature, and issues in all cases where a party has a right to have anything done, and has no *other legal means* of compelling its performance. A mandamus lies to compel the admission or restoration of the party applying to any office or franchise of a public nature, whether spiritual or temporal; to academic degrees, to the use of a meeting-house, &c. It lies for the production, inspection, and delivery of public books and papers; for the surrender of the regalia of a corporation; to oblige bodies corporate to affix their common seal; to compel the holding of a court; and for an infinite number of other purposes. As the writ of mandamus is exclusively confined to the court of Queen's Bench, and has been called one of the *flowers* of that court, no writ of error will lie to any other jurisdiction, if there should be anything improper either in the granting of it or in the proceedings under it. We have said that a mandamus does not lie unless the party has no *other legal remedy*. Thus, it does not lie to the Governor of the Bank of England to transfer stock, because the party has his remedy by *assumpsit*; nor to insert certain persons in a poor's rate, though the omission is alleged to have been to prevent their having votes for members of parliament. The court will not award a mandamus for licensing a public-house; nor to compel admission to the degree of a barrister; nor to compel any of the Inns of Court to admit a person as student, or to assign reason for refusing to admit him. Nor for a fellow of a college, where there is a visitor; nor to the College of Physicians, to examine a doctor of physic, who has been licensed in order to his being admitted a fellow of the college; nor to restore a minister of an endowed dissenting meeting-house; for, if he had been regularly admitted, he has his remedy by action. The 1 W. 4, c. 21, facilitates the proceedings in prohibitions and on writs of mandamus. And by 17 and 18 V. c. 125, a plaintiff in an action may in many other cases claim a mandamus commanding the defendant to perform some duty in which the plaintiff is interested.—*Rule Cabinet Lawyer*, p. 795.

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THE  
LEGAL COMPANION.



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APPENDIX.

*Speeches of the Members of the Council of the Governor-General of India regarding the passing of the New Civil Procedure Act.*

GOVERNMENT OF INDIA.

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ABSTRACT OF THE PROCEEDINGS OF THE COUNCIL OF THE GOVERNOR GENERAL OF INDIA, ASSEMBLED FOR THE PURPOSE OF MAKING LAWS AND REGULATIONS UNDER THE PROVISIONS OF THE ACT OF PARLIAMENT 24 & 25 VIC., CAP. 67.

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The Council met at Government House on Wednesday, the 28th March 1877.

PRESENT :

His Excellency the Viceroy and Governor General of India, G.M.S.I., *presiding*.

His Honour the Lieutenant-Governor of Bengal.

The Hon'ble Sir Arthur Hobhouse, q.c., K.C.S.I.

The Hon'ble Sir E. C. Bayley, K.C.S.I.

The Hon'ble Sir A. J. Arbuthnot, K.C.S.I.

Colonel the Hon'ble Sir Andrew Clarke, B.E. K.C.M.G., C.B.

The Hon'ble Sir J. Strachey, K.C.S.I.

Major-General the Hon'ble Sir E. B. Johnson, K.C.B.

The Hon'ble T. C. Hope, c.s.i.

The Hon'ble D. Cowie.

The Hon'ble Maharaja Narendra Krishna.

The Hon'ble J. R. Bullen Smith, c.s.i.

The Hon'ble F. R. Cockrell.

The Hon'ble B. W. Colvin.

The Hon'ble Maharaja Jotindra Mohan Tagore.



The Hon'ble Sir Arthur Hobhouse moved that the Reports of the Select Committee on the Bill to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature be taken into consideration. He said :—"this motion is not one to pass the Bill before the Council into law, but it is intended to lead up to that final step, and I should like to add something to the reasons which I assigned a fortnight ago why that final step should now be taken, because, unless it is now taken, the labour of the Council in travelling into the consideration of these reports may prove to be premature, and may be to a considerable extent thrown away.

"I have seen some appeals publicly made to me of late days not to allow any desire I may feel to connect my name with the passing of this measure to influence me in trying to pass it. These appeals have not been made in any rude or disrespectful spirit; on the contrary, they have been made in terms that are only too complimentary to me; but there are one or two observations to be made upon them. In the first place, the man who built his house upon the sand would be a wise man compared to myself if I were to hope for any immortality because I happened to be the Law Member of Council at the time when this Bill was passed into law. We hope that this Code will be an improvement on the Code of 1859. But it is not nearly so great or difficult a work as the Code of 1859, because it is not nearly so original a work. Yet who connects the names of the authors of the Code of 1859 with that Code? It is true that men like Sir Barnes Peacock, Sir James Colville, or Sir Henry Harington have a lasting reputation, but that is because they have uniformly distinguished themselves throughout their lives, and not on the particular account of the Code of 1859.

"But even if I were vain enough to indulge in aspirations such as—

*Forsitan et nostrum nomen miscebitur istis*

or to sing,

*Non omnis moriar, multaque pars mei  
vitabit Libitinam*

—if I were vain enough to indulge in any such sentiments as these, I am not going to be unjust enough to put myself in the place of those who have performed the solid part of this work. My Lord, the man who has done the greater part of this work from the time of the re-arrangement of the Code in 1875 up to the final correction

of the proofs, is Mr. Stokes. The man who has borne the second part in the labour is our colleague, Mr. Cockerell, who has brought to it all his great experience and ability and his untiring industry. In fact it is my belief that Mr. Cockerell knows this bundle of papers by heart; for when I want to know where anything is to be found, I do not trouble myself to hunt about the table of contents for it, but I ask him, and he immediately tells me. Moreover there is the original draft by Sir Henry Harington on which this Bill is founded, and there is the great number of able and industrious gentlemen outside this Council, to whose labours a large portion of the Bill is due—men like Sir Richard Garth, Mr. Justice Turner, Mr. Justice Ainslie, Mr. Field, and others whom time would fail me to mention. In fact if there ever was a law framed by the concurrence of a number of skilled hands, this is such a law; and if I were to appropriate it to myself because I happen to be the spokesman in Council, I should be an impostor, and some condign punishment would infallibly overtake me.

“I think that in this Council I need not disclaim any personal motive, but I wish to show how in point of fact there can be no personal motive for my pressing on the passing of this Bill.

“The only reason for the postponement of the Bill is, that it has been so short a time before the public. I dealt with that matter before, but I should like to read to the Council a letter which I received within the last two or three days from Mr. Justice Turner of the Allahabad High Court. He is one of the most able and uncompromising opponents of a certain portion of our Bill; and he is also one of those who have come forward and have assisted us most materially in framing that same Bill. He writes thus:—

““Although as you are aware I was strongly opposed to some of the provisions of the Procedure Code Bill, No IV, and although I now I shall remain unconvinced of the desirability of some few of the modified provisions which remain in the Bill you propose to pass, I have no hesitation in asserting it will be a public misfortune if the passing of the Bill is delayed.

““It cannot be said that the proposals embodied in the Bill have not been before the public for a sufficient time to enable all those who would be likely to criticize them to submit their opinions.

““I have no reason to expect that within any reasonable period the constitution of the Legislative Council will be so altered, or the opinion of executive officers so much changed, as to promise a more favourable consideration of the objections I still entertain to some few sections.

“ ‘On the other hand, should those sections of the Bill be disallowed by the Secretary of State, the symmetry of the measure would be undisturbed, and the valuable additions it makes to our rules of procedure would be immediately secured.

“ ‘Moreover it is, as I understand it, the chief recommendation of a Code that any defects which escape notice in its enactment, or any provisions which may be found to operate unadvisably, may be immediately corrected by legislation.

“ ‘For these reasons, if you think my opinion as an opponent of a few of the provisions of the Bill of any weight, I have felt bound to put you in possession of it.’

“ ‘Now I do think his opinion of weight, because no man outside this Council has more carefully studied our work than Mr. Turner, and no man is in a position which better enables him to judge what good it is likely to effect in the general business of the Courts of Law.

“ ‘The plain fact is, that a change of officers who have the conduct of a great measure like this does lead to disturbance of the work, and to waste of power. We all have our parts to play—Mr. Cockerell has one part, Mr. Stokes another part, and I a third part. If I go away Mr. Stokes must play my part, and his successor must play his. That would infallibly result in the unsettlement of portions of the work, and the necessity of doing a good deal of it over again. If therefore the matter is in substance ripe for final discussion, it is worth while to strain a point to bring on that discussion before a change takes place. I am afraid that some inconvenience has been caused to members of Council owing to the last print of the Bill being placed in their hands so late. But as regards the substantial questions of controversy which are embodied in this Bill, it seems to me that the time has come when they are quite ripe for final discussion; and therefore I hope the Council will not object to bring on that discussion now and finish it.

“ ‘Now I will pass to the more direct subject of my motion. There are three reports before the Council to consider. You are aware that this Bill was published in the year 1864. That publication brought in a great quantity of valuable comment, which resulted in the alteration of the Bill, and the republication of it in the year 1865 in the shape in which it was intended that it should pass. However the work was suspended, and it was not resumed until the year 1873. We then found that owing to changes in the law and other circumstances, it was necessary to alter the draft of 1865 to such an extent that it was convenient to recast it altogether.

Accordingly we did that, and we published it in a remodelled form, being that Bill which is labelled Bill No. III. That re-publication was accompanied by a report which is the first report before the Council. Our re-publication brought us in a very large amount of most valuable and laborious comment from a number of skilled persons, which resulted in numerous alterations set forth in our Bill No. IV. No. IV was published in September 1876, and was accompanied by a report which is the second report before the Council. Again we have had a great number of comments; not so many as before, but some of very great value; and again we have made a number of alterations; not nearly so many as before, but such as necessitated the reprinting of the Bill. The reprinted Bill is the Bill on the table and is numbered V. It is accompanied by a final report, which is the third report before the Council.

"The various papers have been placed in the hands of Hon'ble Members from time to time as they have been printed. They have not been placed on the table; and indeed if they were on the table, I should be speaking from behind a sort of breast-work of papers, and all my colleagues would be equally well protected; but they are in the hands of Hon'ble Members to use as they think fit.

"The substance of the two earlier reports has been explained to the Council, and I think I need not refer to it except so far as it may be in controversy at the present moment. Neither need I refer to the great quantity of detailed matter which we have touched from time to time. I shall confine this opening to the two subjects which have attracted general attention since the publication of Bill No. IV.

"The first of these subjects is the distribution of business between District Courts and Subordinate Courts. In Bill No. IV we proposed an alteration of the law for the purpose of confining to District Courts certain kinds of business now performed by Subordinate Courts. My hon'ble friend Mr. Cockerell explained the reasons for that proposal, and no doubt there was and is a good deal of reason and also a good deal of authority, as incidentally I shall have occasion to show, for the change proposed. But there came to the Committee so much evidence of the practical inconvenience likely to be caused by the change, that it seemed to them or the majority of them to preponderate, and it was thought wiser to leave matters as they now stand.

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"There is a notice of motion on the paper in the name of my hon'ble friend Maharaja Jotindra Mohun Tagore. It is the third notice which stands in his name, and touches the relations of District Courts and Subordinate Courts. But it does not touch the general principles on which the changes were made by Bill No. IV, and I shall say nothing more about it at the present moment.

"The second subject of controversy relates to those parts of the Code which regulate the execution of decrees for money-debts. When I addressed the Council in September last, I stated that our Code was found to work in a harsh and rigid way against the debtor, so as to drive men to despair, and to create much suffering and even danger. I said that having proposed to soften the law in this respect by our Bill No. III, we had on the evidence and advice sent in to us proposed to go further in the same direction and soften it still further by Bill No. IV. I mentioned various points in which we proposed alterations for that purpose. The principal of these were imprisonment for debt, the sale of land, and the exemption of property from execution at the instance of the creditor. Now in proposing these alterations we had regard to what was told us of the state of various parts of the country, which warned us that a very rapid transfer of land from the hands of one class to the hands of another class, or too great harshness and rigour in the prosecution of decrees against debtors, produced great misery and disorder, and even in some parts of the country danger. So far then, although it is confined to its own proper province of procedure, our Bill is connected, as other legal operations are connected, with a great political question. I thought we had given to the State somewhat more power than the present Code gave to it to guide the course of a decree, though I think now that in that opinion I was mistaken. But still I thought that substantially we aimed at the same objects with our predecessors who framed the Code of 1859, and that we kept their main lines intact. Speaking in Council I summed up the alterations thus :—

"These provisions relating to execution-sales constitute the principal alteration that we propose in the Code, and our object has been to alleviate the harshness and rigidity of the law, to diminish the number of forced sales, and to get for the owner of the land something like an adequate value for it, at the same time keeping clearly in mind the important principle—one of the most important objects of all civilized society—that a man should perform his contracts and pay his debts to the best of his ability."

"Such being my view of our proposals, what was my surprise when I found that the publication of the Bill brought us in lectures on political economy, or what calls itself such, and charges that we were confiscating property, disturbing the money-market, re-enacting usury laws, reverting to a patriarchal system of government, undergoing violent oscillations of policy which was known only to the minds of Indian officials, disregarding the wisdom of ages, and making laws at variance with human nature. Indeed such a storm of expostulation arose that I was quite frightened, until the happy thought occurred to me of looking to see what the existing law actually is, and what were the alterations we proposed. Then I was comforted, for with one dubious exception which I will explain presently, I found that we had proposed no more than what I had stated to the Council. In fact we had proposed something less. For being driven by stress of weather to examine the motives of the Code of 1859, I satisfied myself that not only did we aim at precisely the same objects with the framers of that Code, but that we had in contemplation precisely the same methods as they had. In fact the head and front of our offending is this, that we show an intention on the part of the legislature that the powers existing in the law, but now lying unused, shall be used, and for that purpose we proposed to commit them to hands more likely to use them.

"It will be convenient if at this point I explain to the Council what are the provisions that are so much complained of, and what they do, and what they do not, effect. They will be found in the sections of Bill No. V which are numbered 320 to 325. I omit section 326, because it is only a repetition of what is in the existing Code, and I do not for the present speak of section 327, because it turns upon some considerations which are peculiar to itself.

"In the first place these sections do not of their own force work any alterations either in law or practice, for they are only to be brought into action when and where the Executive Government thinks fit.

"In the second place they do not interfere with any specific contracts affecting land, such as a mortgage. If, for instance, land is to be sold in pursuance of a mortgage, the only powers the Collector will have over the sale are those powers which a prudent vendor by auction commonly exercises—the power of lotting the property, of adjourning the sale, of fixing a reserved bid, and of buy-

ing in. But in connection with this point, I should say that, owing to some inadvertence in the drawing of the Bill No. IV, it might have been considered that the whole of these sections applied to mortgages as well as to unsecured money-debts. It was obvious indeed from the context, and also from what I said in Council, that they were not intended so to apply; and in his comments, Mr. Justice Turner has treated this defect as an obvious slip, and with his invariable fairness has taken no advantage of it in his argument. But I mention the matter now because it may possibly account for what seems to me the very exaggerated views of our operations entertained by various of our critics.

"So much for what the sections do not effect. Now for what they do.

"Section 320 enables the Executive to declare that in any place and with regard to any class of decrees for the sale of land, the execution of the decree shall be committed to the hands of the Collector.

"Section 321 gives to the Collector the ordinary powers of vendors at auction-sales.

"Section 322 gives him further powers in cases only of money-decrees, namely, powers of arrangement between debtors and creditors. It provides that if he sees reason to believe that the judgment-debt of the debtor can be discharged without the sale of the whole of the property, he may raise the amount necessary to discharge the debt, with interest according to the decree if the decree specifies the rate of interest, and according to his discretion if the decree does not specify the rate of interest, by sale, by mortgage, by letting or by taking the property under his own management. The Council will observe, that in sub-section (b), which gives powers to let on farm or to manage, it is provided that these powers shall be exercised only with the decree-holder's consent. That is a restriction which did not exist in Bill No. IV, but was introduced by the Committee in Bill No. V, and my hon'ble friend Sir Edward Bayley has a motion on the paper for the purpose of restoring the provisions of Bill No. IV, in that respect.

"Section 323 requires the Collector to ascertain the other judgment-debts of the debtor, and it protects the property against alienation while in the hands of the Collector, just as the existing

Code protects the property against alienation while in the hands of the Court.

"Section 324 provides that if the arrangements made by the Collector do not succeed in paying the debt, the property shall be sold after all.

"Section 325 makes the Collector accountable to the Court for all his receipts, and it directs the distribution of the proceeds in payment of the debts.

"I should have thought that these proposals were moderate and reasonable enough, but they certainly do not appear so to some people, because they have been severely observed in several quarters. I will read to the Council what Mr. Justice Turner says about them. I select him, not because he stands alone, but because he puts with much force what he has to say. He has sent in to the Committee a Minute on Bill No. IV, which I can recommend as good reading to those of the Council who have not read it, in which he first enters into some general arguments directed against patriarchal government. Possibly those general strictures might have been modified in view of the alterations made since Bill No. IV was published, but those alterations have not prevented a hostile motion, and I have to meet the whole line of argument on which that is grounded. In the course of these arguments he makes the following observations :—

" 'In India however there exists, I will not say a school of political thought, but a numerous body of gentlemen, who declare that the experience of centuries should be disregarded, and that the rules of political and economical science which the wisdom of Western philosophy has deduced from the motives ordinarily influencing mankind, are wholly inapplicable to Eastern nations.'

"Then when he comes to these particular clauses he says :—

" 'The first objection which I have to offer to these sections, in common with section 326, is, that the Legislature is called upon to delegate its functions to an authority so eminent as to be almost above the reach of criticism. It is asked to empower the Executive Government, by purely arbitrary acts which will have *ex post facto* operation, to disturb the securities on which millions of rupees are invested, and to deprive persons who have money-claims against the owners of lands of the fund to which they are entitled to have recourse, and which, in the case of money lent, was the basis of the debtor's credit.'

"Now pausing here for a moment to explain, the Council will notice that section 326 of Bill No. IV, which Mr. Turner mentions, is section 327 of our Bill, to which I have said that different consi-



derations apply. Nor does he mix up the two together. But all his observations, as the Council will observe from what I have said, apply both to the earlier sections, 320 to 325, and apply again to 327. He is also speaking of general money-debts, which he alleges to be contracted with an eye to the land, and not of debts secured by mortgage.

“Then he continues:—

“‘Such acts amount to confiscation. Nothing can justify them but the gravest political necessity, and at present no such necessity exists or is imminent. I urge then that legislation should be postponed until the necessity arises which justifies the creation of this power.

“‘The oscillation of official opinion, owing to the constant changes of the *personnel* of the Government and the absence of party traditions, is so great, that economical measures are never killed, but revive at least once in a decade of years. Although I believe no one who pretends to statesmanship would at the present moment exercise powers of which the iniquity is apparent, and which are justifiable only in extreme emergencies, when the tide of official opinion turns, pre-sure may be brought on the Executive to avail itself of powers which it has ready at hand, and which, were time allowed for public discussion, it would not create’

“Well now that is a good, honest, outspoken statement of the faith that is in a man, and such as one likes to see; and I think that we ought to be very much obliged to any gentleman who, with no motive whatever but the public interest, takes the trouble to put what he believes to be the truth into such very frank and clear language. At the same time it seems to me that the remarks are misdirected when they are applied to the provisions I have explained to the Council. I say the same of other similar arguments, and the Council will understand me to be addressing myself to the whole line of attack represented by the motion of my hon’ble friend the Maharaja Jotindra Mohan Tagore.

“Inasmuch as I contend that we are only proceeding cautiously on lines already laid down, the Council will hardly expect me to take much time in combating arguments which, whatever their abstract value may be, are pitched so high as entirely to miss the mark. But before I go on to show how they miss the mark, I will try to show what seem to me to be the broad differences of opinion between the opposing parties

“I may be wrong, and I hardly suppose that our opponents will accept my view of what is necessary to make their position a sound one, but it seems to me that they cannot support their objections

without first making good two propositions. The first of these is, that when a man has made a contract with another man, he is entitled to call upon the supreme forces of Society to step in and enforce his contract in every jot and title, and that without allowing to Society any moderating influence over the contract, unless perhaps it can be shown to be grounded in fraud. The second proposition is, that a contract by A to pay B a hundred rupees is a contract by A to strip himself of every shred of property that he possesses in order to make good that hundred rupees.

"Now both these propositions seem to me exaggerations of principles which, if stated with their due qualifications, most people will be ready to accept. Of the first proposition I should say, that it is a most sound and important principle that people should be held to the substantial performance of their contracts. But I should add that if the rigid and extreme performance of contracts is found to produce misery and disorder, then Society, which is called in to enforce these contracts, should exercise some moderating influence over them, and that such a duty is the more imperative in proportion to the helplessness of the debtor-class. Of the second proposition I should say, that a contract to pay a sum of money seems to me quite a different thing from a contract that the borrower shall strip himself of all the property that he has for the support of himself and his family in order to pay that money. It may be argued that, in order to enforce a contract to pay money, it is the duty of Society to step in and strip the borrower naked. But I do not see how it is even arguable that if such a process takes place, the creditor does not get something outside the terms of his contract. If he does, terms may be reasonably imposed upon him in return, such as are found necessary for the peace and welfare of Society.

"How far Society should step in and insist upon some moderation as the price of its assistance, is a question of detail which has to be solved in every age and in every country. But it seems to me that all laws intended for the protection of debtors on terms short of the payment of the whole debt—laws of bankruptcy, laws for the exemption of property from execution—are founded on the view I take of the duties and interests of Society.

"It is clear however that our opponents assume that the laws of other nations are in accordance with their views of what is a righteous law of debtor and creditor. And, indeed, in another

passage occurring amongst his general observations, Mr. Justice Turner speaks of such legislation as ours as being 'a divergence from the laws ordinarily accepted by civilized nations.'

Now I do not myself profess much knowledge of any law except the laws of England and of India. But the Council are aware that the Bombay Government lately appointed a Commission to enquire into certain serious outrages committed in some of the districts of the Dekkhan by the peasants upon the money lending classes. That Commission have made an able and elaborate report. They draw a very distressing picture of the state of the country, and they assign as one of its causes the state of our law of debtor and creditor. I will read to the Council what they say of the law of India as compared with other laws. They speak thus:—

"In order to recover a debt, it is obvious that resort can only be had to the property, present and future, of the debtor and to the labour  
Imprisonment. of the debtor and his family. A law which allows an un-

limited resort to all these means of recovery gives the greatest help to the creditor that it is physically possible to give. The law of India appears to be the only modern law which allows such unlimited resort, and we find that under it the debtor and his family are liable in person and property to an extent which is practically unlimited.'

"Then they go on to mention some details of our law and of other laws, and they continue thus:—

"96. The more statement of what the power of the creditor is, would seem in itself a sufficient answer to the question. The power to utterly ruin and enslave the debtor is a power which clearly the creditor ought not to have, and as a fact it was never intended when the Code itself was passed that the creditor should have it. The ancient laws of most countries,' says Mill, 'were all severity to the debtor. They invested the creditor with a power of coercion more or less tyrannical, which he might use against his insolvent debtor, either to extort the surrender of hidden property or to obtain satisfaction of a vindictive character, which might console him for the non-payment of the debt. This arbitrary power has extended in some countries to making the insolvent debtor serve the creditor as his slave, in which plan there were at least some grains of common sense, since it might possibly be regarded as a scheme for making him work out the debt by his labour. In England the coercion assumed the milder form of ordinary imprisonment. The one and the other were the barbarous expedients of a rude age, repugnant to justice as well as to humanity.' When we compare the law of India with that of other countries, we find that not one is so oppressive as the Civil Procedure Code in this respect, not even the oldest law in the world, the law of Moses, which allowed the debtor a discharge after serving seven years.'

"The Commission are here speaking of our general law of debtor and creditor, not only of that which relates to the sale of land, but also of that which relates to the seizure of chattels and of th

person. But the Council will find that the whole of these subjects are mixed up together, and that those who object to the restriction of the creditor's power with respect to the sale of land are the persons who also object to the restriction of his power in other respects.

"Now with regard to the law of England, inasmuch as England may claim to have been in the rank of civilized nations for some time, I should like to give to the Council an account of what the law respecting the sale of land for debts has been and is there, which I think I may do without any great degree of prolixity.

"Before the reign of Edward I, land could not be taken in execution at all for a general debt. In that reign a Statute was passed known as the Statute of *elegit*. It gave to the creditor power to take the chattels of the debtor, except his oxen and his beasts of the plough, and power also to take one moiety of his land. The *elegit* creditor, as he was called, might take possession of the land, but he was subject to account for his receipts in the Court of Chancery, and he had no right to a sale. When he was fully repaid by the rents of the land, the debtor resumed possession. It is true that by means of successive *elegits*, as when various creditors took out judgment against a debtor, he might be deprived of the whole of his land instead of half. It is also true that possession by the *elegit* creditor not unfrequently resulted in the sale of the land, and that there was a tendency for such sales to increase; but such sales only took place through the medium of a Court of Equity, and with all due and proper safe-guards, and only in those cases (by no means all cases, though, as I have said, there was a tendency in them to increase) in which the Court had by some means or other acquired jurisdiction to sell. In such cases, to use the expressions of Mr. Justice Story, 'where the payment of the judgment cannot be obtained at all by a mere application of the rents and profits (as if the interest upon the judgment exceeds the annual rents and profits), or when the payment cannot be obtained out of the rents and profits within a reasonable time, Courts of Equity will accelerate the payment by decreeing a sale of the moiety of the lands.'

"Now that was the law of England for five hundred and fifty years; and it seems to me,—though of course it differs in detail for we have not the same machinery here as in England, but it seems to me a law not very unlike the arrangements which we con-

template, though more prohibitive of sales of land. It provided for payment of the creditor by the gradual application of the rents of the land for that purpose; it did not resort to the sale of land except where these means failed, and in many cases did not resort to it at all. And yet the existence of such a law did not prevent England from rising into the very front rank of commercial nations.

"It was not until the year 1838 that matters were thought ripe for an alteration of that law. In that year a Statute was passed which effected the alteration. First the creditor was enabled to take possession of the whole instead of only half of his debtor's land; and secondly, when he had procured a judgment of a superior Court, it had the same effect as if the debtor had agreed to charge his land with the amount of the debt.

"Unless some change has recently taken place which I do not happen to know of, that is the law of England at the present moment. And it is attended with incidents which must make it extremely unsatisfactory to those critics to whom I have referred; for it by no means gives to the creditor the short, sharp, swift, direct remedy against the debtor's land which they think is necessary for the law of a civilized country. In the first place, it is only the superior Courts—that is to say, some five or six Courts in England—which can issue decrees charging the land at all; and that is the sort of arrangement which my hon'ble friend Mr. Cockerell proposed for India. In the second place, though the creditor might at once take possession of his debtor's land, he must account for every farthing of his receipts in the Court of Chancery. In the third place he acquires no immediate right to sell that land. If he wants to sell, he must institute an entirely new suit in a Court of Equity; a Court which takes care that all parties interested are brought before it; a Court which will give every facility for arrangement and accommodation as it well knows how to do, and when it does decree a sale will take care that the sale is carried into effect with all due precautions and safeguards. In the fourth place, the creditor cannot institute even that new suit directly. The Statute says he must wait a full year after he has got his judgment, and after he has performed certain formalities with that judgment. And in the fifth place, our Parliament has been guilty of enacting what these gentlemen call a Usury Law; that is to say, they have provided that when the Court gives to the creditor the security of a

decree, his debt shall carry a Court rate of interest which they have fixed at four per cent.

"It must also be noticed that during all these centuries I have spoken of, there were other influences at work which tended very much to retard the passing of land from the hands of one class to the hands of another class. The most familiar of these influences is the system of entails or strict settlements, a thing so familiar to every reader of English history, that I will not trouble the Council with pointing out its effects. But there was another influence which has been much less observed upon, but which in all probability has exercised no less effect than the system of entails, and that is the action of the statesmen who presided over our Courts of Equity.

"In his concise and admirable account of the distinctive characteristics of Courts of Equity, Blackstone points out this among the chief; that they construed contracts for securing money in a different way from the way in which the same contracts were construed by Courts of law. In point of fact the Courts of Equity exercised a regulating power over such contracts, and they exercised it in favour of debtors.

"The common form of a penal bond is this. A borrows £100 of B, and he contracts that if he does not pay B within twelve months he shall pay £200. The terms of the contract are as clear as noonday; and yet the Courts of Equity held that the penalty of £200 was a mere fashion of speech, Shylock's merry jest, a sort of playful way of securing principal and interest. And accordingly to principal and interest they confined the creditor, and they prohibited him from suing for the penalty.

"The common form of mortgage is, that the borrower conveys his land to the lender out and out, but with a proviso that if he pays the lender the sum borrowed in the course of a year, the conveyance shall be void; otherwise it remains indefeasible. Again I say the contract is as clear as noonday, but Courts of Equity applied to it the same construction that they applied to penal bonds, and they allowed a debtor to redeem his land after very long periods of time on payment of principal and interest.

"Now that is something like interference with contracts. And indeed there were not wanting eminent persons, principally common lawyers, who denounced the proceedings of the Courts of Equity

in language as vigorous as that in which our far milder proceedings are denounced at the present moment. The battle was nearly over by Lord Hale's time, but even he complains that 'by the growth of Equity on Equity the heart of the Common Law is eaten out, and legal settlements are destroyed.' The fact is that these proceedings of the Courts of Equity led to very sharp collisions between them and the Courts of Law. But the Courts of Equity held their ground, because the good sense of the nation was at their back. Their doctrine as to mortgages has long since formed part and parcel of the framework of the Law of England; and their doctrines as to bonds were imported into Common Law Courts by a Statute passed in the reign of Queen Anne.

"Now upon that brief review of English history I think the Council will have observed two things. One is the extreme slowness with which, even in an advancing commercial nation like ours, the *corpus* of the land, as distinguished from its temporary and redeemable possession, was made available to answer general debts. The other is the care which our legislature took, when it was at last giving the creditor full remedies against his debtor's land, to provide that these remedies should be worked with due moderation and caution, and under due control.

"Slow and spontaneous changes such as these are the healthy growth of nations. But some of our critics tell us that we are right, indeed that we are bound, to introduce all these changes, and more than all, at once, without the slightest attempt at mitigation, by foreign rule, into extremely backward communities. Certain abstract principles are brandished in our faces, and we are told that if we hesitate to transmute money-debts into the ownership of the debtor's land, we are setting ourselves against the experience and wisdom of ages. I answer that the study of history and the study of contemporary phenomena equally convince me that nations do not accept that species of transmutation very readily; and that for us to put it into force without any attempt at mitigation among primitive agricultural communities is not Political Economy; it is not Policy; it is not Economy, nor any combination of the two; but it rather savours of pedantry, and of a disposition to treat matters on some *a priori* theory, instead of dealing with men as we find them.

" Having now as I trust disposed of the assertion that we are setting ourselves against the example of all civilized nations and on principles peculiar to Indian official nature, I proceed to examine the assertion that even in India such a proposal as we have made can only be due to some violent oscillation of official opinion.

" The existing Code of 1859 contains the following provisions:— By section 243 it is provided that where the property attached consists of land, it shall be competent to the Court to appoint a manager, and that the manager shall collect the rents and apply them in payment of the debt, and to the term of such management no limit of time is assigned. It is also provided that if the judgment-debtor can satisfy the Court that there is a reasonable ground to believe that the amount of the judgment may be raised by mortgage, lease or private sale, it shall be competent to the Court to postpone the sale for such period as it may think proper to enable the judgment-debtor to raise the amount. And again to that postponement no limit of time is assigned. Now I think that those who followed me in my exposition of Bill No. V, sections 320 to 325, will see that the Court has here given to it powers as wide and large as those which we propose to bestow upon Collectors. It may pay the debt by management, and by gradually applying the rents and profits. It may allow the judgment-debtor to try his hand at making arrangements short of a suit. In point of fact the powers given to the Court are somewhat larger, because we propose to limit the Collector's operations to twenty years, whereas the Code leaves the Court's operation unlimited in point of time; and we propose not to apply our provision to mortgage-debts, whereas this section is so framed as to apply to mortgage-debts.

" By section 248 it is provided that if the property to be sold is land, and the Government shall so direct, the sale shall be conducted by the Collector on the requisition of the Court. And by section 244 it is provided that in such a case as is mentioned in section 248.

'If the Collector shall represent to the Court that a public sale of the land is objectionable, and that satisfaction of the debts may be made within a reasonable period by a temporary alienation of the land, the Court may authorize the Collector, on security for the amount of the decree or for the value of such land being given, to make provision for such satisfaction in the manner recommended by the Collector, instead of proceeding to a public sale of the land.'



"Now what is the object of these sections? To find that, I refer to the debates which took place in Council when the Legislature was engaged in discussing the Code.

"In the first place the Council had before it much evidence of the mischief and embarrassment which was being produced by the rapid transfer of land from one class to another, and they had also before them a despatch from the Secretary of State, Lord Stanley, written in 1857, the terms of which I will proceed to state. He began by saying:—

"It cannot be doubted that the increased powers in respect of sales relating to real property, which of late years have been conferred upon the Subordinate Civil Courts, have greatly promoted the rapid transfer of such property from old to new hands."

"Then he goes into some details on the subject, and continues thus:—

"With reference to the foregoing remarks, the question arises as to the expediency of altering the existing constitution of the Munsifs' Courts, and of reverting to the system under which they were tribunals for the adjudication of suits only for money or other personal property, at the same time enlarging, if thought advisable, their jurisdiction in such cases. A further check might be imposed by providing that no process either for attachment or sale of real property shall be allowed in cases below a fixed amount, and that in suits exceeding that amount the Munsif shall not be competent to issue such a process without the previous sanction of the Judge."

"That was the proposal made by Bill No. IV which my hon'ble friend Mr. Cockerell explained to the Council at Simla. There was another proposal before the Council, that they should put some express prohibition upon sales, in what form I do not exactly know, for the principle was discussed without any definite plan being propounded; but the Council did not see their way to it. Neither did they see their way to the suggestion made by Lord Stanley. Whether they rejected it on account of the practical considerations which have influenced us I cannot find. At all events they did not accept either of those two suggestions, but instead thereof, and with the same object, they enacted these sections which I have been citing.

"Sir Henry Harington moved to insert that section which is now section 243, and the reason he gave is stated as follows:—

"The addition proposed by him was intended to meet to some extent the objections entertained by many persons to the sale of land in satisfaction of money-decrees. He would not now go into the very important question as to whether such sales should or should not be allowed."

"He then intimates his opinion that there was some exaggeration in the matter, and that alienation of land could not be prevented.

"Mr. Currie proposed the introduction of the section which, with a difference, is now section 244, and he spoke thus :—

"He remarked that the present section went a step further than the last section. The Judge of Cawnpore, the Commissioner of Allahabad, and the Agra Sadr Court, objected to the indiscriminate sale of land. Mr. Muir objected to any sale of land at all under civil process. He (MR. CURRIE) would not go so far as Mr. Muir. He agreed generally with what had been said on the subject by the Hon'ble Member for the North-Western Provinces. But even if it were admitted that the transfer of the land from the hands of the old proprietors was an unmitigated evil, still in the existing state of things that would be no sufficient reason for a general stoppage of sales.

"Something however was to be conceded to opinions so strongly expressed and urged by the authorities he had named. The new section which he proposed would enable the revenue authorities to interfere in behalf of old proprietors in all cases in which such interference could be beneficially exercised."

"Now I will ask what difference is discernible between the policy of 1859 and the policy of 1877. Then, as now, there were differences of opinion on this subject; then, I hope I may say as now, the majority of opinions was, that something should be done to check the indiscriminate sale of land; then, as now, the Council rejected the proposal to confine decrees for the sale of land to District Courts and the proposal to put a direct prohibition on such sales; as then, as now, they resorted to the scheme of giving large powers of arrangement to some authority which in the first instance they said should be a Court of Law; and then, as now, they contemplated that these powers should be exercised by the Collector.

"I do not find that any body then came forward to tell the Council that they were meditating confiscation or interference with contracts. But if we are doing so, most certainly they were. If I am a creditor seeking to sell my debtor's land, and if it is confiscation of my rights to tell me that I must be content with payment out of the rents, it is no consolation whatever to me that the officer who tells me so is called a Judge instead of being called a Collector, or that he is a Collector set to work by a Judge instead of being a Collector set to work by the Government.

"However that was the reasonable policy which our predecessors adopted, to call in some controlling power to make reasonable arrangements, which might be the Court or which might be the

Collector. Unfortunately it was suggested by somebody that if the land was in the hands of the Collector, some further security was required for the payment of the debt; though nobody seemed to dream that any further security was required when exactly the same process was going on in the hands of the Court. But in the course of the debate, apparently without any further consideration, that idea was accepted, and the clause I read to the Council about security was put in, which converted section 244 to almost an absolute dead letter. There is the section however and as evidence of the policy of the legislature it and the reasons for it remain; and we ought not to be charged with violent oscillations of opinion and departure from the policy of our predecessors because we are attempting to make a living letter of that which has become almost a dead letter.

"But I have something more to say on this point. The Code of 1859 extended of its own force only to the Regulation Provinces of the three Presidencies. With respect to the rest of India it is extendible by order of the Executive Government. When it came to be extended to Non-Regulation Provinces, it was found that although in other respects it might be suitable to those Provinces, in respect of the sale of land which it authorizes so freely it was not suitable; and accordingly the Lieutenant-Governor of Bengal extended it to his Non-Regulation Provinces, or to some of them, with the proviso that the land should not be sold without the consent of some executive authority. Well His Honor had no power to do that. The moment this question came up before the Council they proceeded to alter the Code; and in the month of July 1859 Sir Henry Harington introduced a Bill to enable the Local Governments of the Non-Regulation Provinces to do the thing that the Lieutenant-Governor of Bengal had assumed to do.

"On that occasion he spoke as follows:—

"Lastly, the Bill proposed an alteration in section 385 of the Code. That section set forth that the Act should not take effect in any part of the territories not subject to the general Regulation of Bengal, Madras and Bombay, until the same should be extended thereto by the Governor-General of India in Council, or by the Local Government to which such territory was subordinate, and notified in the Gazette. Hon'ble Members might have observed in a recent number of the *Calcutta Gazette*, that the Lieutenant-Governor of Bengal had extended the Act to certain Non-Regulation districts under his Government; but that in doing so, His Honor had added a proviso that no sale of land should be made without the sanction of the Commissioner of the Province. The Code

contained no such provision, and a question might arise as to the competency of the Lieutenant-Governor to pursue this course, and whether, if he extended the Code at all, he was not bound to extend the whole Code. But as it seemed very desirable that the power exercised by the Lieutenant-Governor of Bengal in this instance should exist somewhere, the Bill proposed to authorize the Government of a Non-Regulation Province to which the Act might be extended, with the previous sanction of the Governor-General of India in Council, to declare that the Act should take effect therein subject to any restriction, limitation or proviso which it might think proper.

“The Bill was then passed into Law. It has since been re-enacted, and it stands now as section 39 of Act XXIII of 1861. I have before stated to the Council how very largely that restriction on the sale of land has been used. The modifying power extends as you have heard to the whole of the Code; but it has hardly been used at all, except only for the one purpose of moderating the sale of land; and for that purpose it has been used throughout very large Provinces. I am not prepared to say in how large a portion of the Non-Regulation Provinces of India, but certainly throughout the Punjab and Oudh and the Central Provinces the Code was only put into operation subject to the restriction that the sale of land in execution of decrees should not take place without the consent of some executive authority.

“Well now we have this result, that for the purpose of preventing the too indiscriminate sales of land which it was found the Code allowed, the Council of that day, the very same men who passed the Code, within four months after they passed it into law, passed an amending Act giving powers to the Executive of an extent and magnitude compared to which the powers we propose to give are the merest flea-bite; not a mere power to say that certain operations may be executed by one hand instead of another, but a power to extend the Code subject to any restriction, limitation or proviso whatever. And it is not right that we should be charged with departing violently from the policy of our predecessors, when we are only following their footsteps at a humble distance.

“Now I hope I have given the Council reason to think that the condemnation of our proceedings, however confidently and boldly pronounced, is founded on erroneous data and on a narrow and partial view of the case. At all events I am anxious to hear the allegations and arguments by which that condemnation is supported in Council. I know that whatever can be said on that subject will be said by my friend Maharaja Jotindra Mohun Tagore; for in

Committee he has supported the views of the objectors with great ability and acuteness, and I must add with equal good feeling and moderation.

"The next question is, whether we have any case for altering the arrangements of the law at all. And here again I find a disposition to assume that our district officers must all be mistaken in what they think they see; and that if there is any mischief going on, it is all due to other causes, and not to this cause, namely, the state of the law of creditor and debtor. Other causes no doubt there are, but it seems to me impossible to doubt that this cause also exists, unless we are prepared to say that a great number of intelligent gentlemen, knowing the country thoroughly, better than any other men, some of them appointed to enquire into this very matter, are all mistaken in what they think they see and hear. I have told the Council before how much evidence there is on this point, and I will now add one other piece of evidence which has come to my hands since I last spoke on this subject. The Dekkhan Commission say :—

"62. Another cause of the increase of indebtedness is the facility with which the money-lending class can command the assistance of the law in the recovery of debt, and consequent upon that facility an expansion of the raiyat's credit, inducing numbers of small capitalists to compete for investments in loans to the Kunbi. We have already quoted Sir G. Wingate's remarks on this point. Although at the present time other causes have combined to impair the raiyat's credit, still one material cause of his present condition must undoubtedly be sought in the state of things described in 1852; and since that date other causes have operated to aggravate immensely the evil which was then discerned. Whatever facilities were afforded by the law to the creditor in 1852 have been greatly enhanced by the introduction of the present procedure in 1859, and by the punctual conduct of judicial duties now exacted from the Subordinate Courts, while the raiyat's credit has been enhanced by the addition of his land and agricultural stock and implements to the security liable for his debts."

"It is their opinion that the provisions of the law and the much greater swiftness with which the law is executed have aggravated the miserable condition in which they found the peasants of that part of the country. They no doubt are speaking of the law at large and not merely of that part of it which relates to sales of land. As regards sales we have this broad fact, that the complaints which come to us are from those parts of the country where the Code is at work without restriction; and those parts of the country in which it operates subject to restriction are the parts from which

complaints do not come. That seems to me a cogent piece of evidence.

“ Our case then is this :—We have evidence, which seems to us conclusive, that the Code has worked in a harsh, rigid, mechanical way, which leads to the ruin of the debtor, sometimes with benefit to the creditor, sometimes without any such corresponding benefit. We do not assume to regulate the contracts of mankind ; we are not reverting to any patriarchal system of government ; but we say that Society ought not to be a mere passive instrument in the hands of creditors for the purpose of skinning their debtors, and that the Code, not in its own nature, nor by the intention of its framers, but in its working, has been made too passive an instrument for that purpose. We are not foolish enough to suppose that we can control human nature ; but we say that mischief which has been created by foreign and artificial causes may be remedied by modifying those causes ; that what procedure has done procedure may undo ; and we believe that we are swimming with the stream, and not against the stream, of human nature.

“ The next question is, whether the alteration we propose is the best we can make. We have not seen our way to other alterations. One other alteration, namely, to confine sales of land to decrees of District Courts, we did propose, but have abstained from pressing it in the face of practical objections. What we do see our way to is the constitution of some authority which will have the power and the will to make some reasonable arrangements between creditor and debtor in those painful circumstances in which the *ultima ratio* has been applied, which will prevent the Code from being merely the means of carrying out to the bitter end that *summum jus* which is proverbially *summa injuria*, and which may in proper cases answer the old prayer of the debtor, ‘have patience with me, and I will pay thee all.’

“ We are trying to give life to the intentions of our predecessors which have to a great extent failed of effect ; for not only have the provisions of section 244, but also those of section 243, failed to a very great extent. That matter was the subject of inquiry by the Government of the North-Western Provinces in 1873, and they received from their officers some accounts of the working of the sections. They sum up the matter thus :—

“ It will be seen that nearly all the officers consulted by the Court are of opinion that the sections in question are almost inoperative either from the ignorance of the judgment-debtor, or from the difficulties in the way of settlement under them. But His Honor the Lieutenant-Governor concurs with the Hon'ble Judges of the Court and the Board of Revenue in thinking that the sections do a certain amount of good, and work for the benefit both of creditors and debtors.”

• “ Now of course sections that are almost inoperative cannot do much amount of good. What is meant clearly is, that the sections are good in themselves: that they are right in principle; that where they do work they do good, but unfortunately they are almost inoperative. I believe that these sections will remain inoperative as long as the motive power is confined to Courts of Law. Such operations are not judicial in their character; they are matters of arrangement and discretion and are quite extra-judicial. They are far more likely to be carried into effect by a person who knows the property, knows the place, knows the people, is accustomed to move about and visit his villages, and is in the habit of making administrative arrangements, than by a man who is accustomed to sit in his own Court, and to decide such legal points as are brought before him. This was seen quite clearly by our predecessors when they passed section 244, avowedly as a further step in the same direction with section 243, and with the view (I will quote the words again) ‘that the Revenue-authorities should be enabled to interfere on behalf of local proprietors in all cases in which such interference may be beneficially exercised.’ That view has not been answered because of the reasons which I have mentioned; and we seek now to make that a living letter which remains a dead one. We see no better plan than to follow the same line of policy, and to call on the Collector to exercise a reasonable discretion, not only when a Court of law thinks fit, but when the Government thinks fit.

“ We are not proposing any rigid law for the whole of India. It is only when the Executive Government thinks that a part of the country requires these provisions, and also that there are hands to work them, that they will be applied. When that is the case, we wish the Government to have those powers which the Bombay Government desired to exercise in 1875, but were deterred from exercising by the opinion—no doubt a very well founded opinion—of the High Court as to the state of the law. Now I confess that

it is at this point that the palsy of doubt begins to affect my mind. I will read a few words from a very valuable paper sent to us by the Advocate General of Bengal, Mr. Paul. He is a gentleman of great experience in Mufassal affairs. He quite approves of what we propose to do for the purpose of softening the law against the debtor; he is only sorry we do not carry some of our provisions a good deal further. He says:—

“If the Collector who may be charged with the execution of decrees be an officer who has sufficient time in his hands to devote to the new department of jurisdiction intended to be created, I think the exercise of the powers proposed to be given to the Collector will be beneficial to debtors.”

“That is just it; ‘if the Collector has time.’ It may be that the Collector has not time. It may be that the Collector’s hands will require strengthening. It may be that in order to work this provision efficiently, we shall have to go further and do what Sir Richard Temple has recommended us to do, namely, to establish a separate execution department. But practical difficulties of that kind are no reason against giving powers to the Government which are sound in principle and which may be exercised in places where no such practical difficulties exist.

“Now I have finished what I had to say upon sections 320 to 325. I do not propose to say anything now upon section 327 but would prefer to hear the reasons of my hon’ble friend Maharaja Jotindra Mohan Tagore for expunging it from the Bill, because I apprehend that what I have said on the other part of the case will with some little addition be sufficient to constitute a good defence.

“But before I close I must call the attention of the Council to section 266, for that also is a part of our work on which we are said to be sentimental, patriarchal, violent, and all the rest of it. I am glad to think no person wishes us quite to go back to the simplicity of the present Code, and to exempt nothing whatever from being taken by the creditor in execution, and that there is no motion on the paper to expunge any of the items which we propose to exempt from execution. In fact I think that members of the Committee were satisfied that we were not being guided by pure sentiment, but that we gave to the matter a fair amount of hard-headed, if not hard-hearted, consideration. I must however tell the Council what alterations have been made. In sub-section (b) we have adopted the language of an old Bombay Regulation, the repeal of which



by the Code of 1859, as the Dekkhan Commission inform us, has caused much distress. It exempts tools, implements of husbandry and such cattle as are necessary to enable a man to earn his livelihood by agriculture. This latter part accords with the first English Statute which gave powers to the creditor to seize his debtor's goods. Sub-section (c) has been modified by the provision that it shall not apply to the execution of decrees for rent. The peculiar relation of landlord and tenant induced us to put in this provision. In sub-section (h), which applies to the salaries of public officers, or quasi public officers such as Railway-servants, we have, instead of exempting the whole of the salary, applied the principle of the English Mutiny Act, and exempted only a moiety. That is a course suggested by Mr. Justice Turner among the many valuable and careful suggestions which he has made to us for the alteration of the Bill. With these exceptions we have maintained the exemptions which were contained in section 266 of our Bill No. IV. But I should mention that there are two items which appear to be very important ones, those contained in sub-sections (g) and (i), but they are only an expression of the present law culled from the Pensions Act and from the Indian Articles of War. They are only put in here for convenience sake so as to have the whole of the exemptions in a single list.

"There are some other minor points connected with the law of debtor and creditor as to which some people think us foolishly indulgent to debtors, but they are comparatively trifling, and I do not think that the Council would be grateful to me if I took up further time by discussing them. I must therefore leave them to be opened by any other Hon'ble Member who may feel it desirable to do so."

The motion was put and agreed to.

The Hon'ble MAHARAJA JOTINDRA MOHAN TAGORE moved that section 417 be omitted. He said that after the very able and exhaustive statement made by the hon'ble and learned member in charge of Bill he had reason to modify his opinions as to sections 320 to 325, regarding which he had given notice of amendment. He gathered that there were certain parts of the country in which the restrictions on the sale of land were absolutely necessary for political purposes; that was a matter respecting which he had nothing to say. He was of opinion that, as regarded Bengal, these sections would be mischievous in their effect, and he therefore desired to oppose them;

but supposing that his amendments were accepted, he feared from the explanations given that certain parts of the country would be in a very unsatisfactory condition. He therefore did not desire to press them; the more so as the sections were of a permissive nature, and he had sufficient confidence in the special circumstances of Bengal, and in the judgment of His Honor the Lieutenant-Governor, to believe that these sections would not be applied to Bengal. He begged leave accordingly to withdraw the amendment which stood in his name with regard to sections 320 to 325. Section 327 was so closely connected with the previous sections, that for the reasons he had already stated, he begged to withdraw his amendment regarding that section also. He next begged to move that section 417 be omitted. Nearly two decades had elapsed since Act VIII of 1859 was passed, and from that time up to the present day the Munsifs had had the power of trying cases in which Government or its officers were concerned. The Principal Sadr Amins, or Subordinate Judges as they were now called, had enjoyed this power from a period long anterior even to that; but now it was proposed to make a retrograde move. He was not aware that there was anything to show that these officers had deteriorated either in character or competency. On the contrary Hon'ble Members of this Council, such as Sir William Muir and Sir Alexander Arbuthnot, had spoken in respect of the provinces which they represented in very high terms of the integrity and efficiency of these judicial officers. Sir Richard Temple in his Administrations Report said:—

“Now I have constantly inquired from all sorts of persons likely to know, European and Native, official and non-official, and the universal opinion attests the integrity and probity of the Native Judges, that is, the Subordinate Judges and the Munsifs. This is to my mind a striking circumstance, and a cause for thankfulness, inasmuch as corruption used to be one of the traditional evils of India.”

The High Court said in one of its reports:—

“The Court has had increasing reason to be satisfied with the performance and promise of the inferior judicial officers under its control, who in point of ability, competency, and attention, are far beyond the Munsifs of former periods. The character of this class of officers has long stood high, but the superior mode in which the business of their Courts is now transacted fully attests the wisdom of the Government in improving their condition in respect of emoluments and prospects.”

Mr. Justice Jackson said:—

“I now come to the Munsifs, and I am able to say with confidence that they continue as a class to improve in carefulness and to bear a high character. We are no longer under

the necessity of employing very young men, and we are able to insist upon the possession of some experience in addition to that of learning and ability which are indicated by the possession of a degree. Generally speaking therefore the Munsifs, even at the beginning of their career, are well prepared for the performance of their judicial duties; and failure in that respect is of great rarity."

Sir Richard Couch remarked :—

"The appeal from a Munsif is in most cases heard by a Judge who is not superior in knowledge or ability to the Judge whose decision is appealed against; in some instances he is inferior."

Mr. Justice Bayley said :—

"My own later experience here is that a Munsif in the Court of first instance, who has been educated in our colleges and schools, and takes his law degree in our University, not only discharges his duty with ability, but with a faithfulness and care and perspicuity which is certainly not surpassed, if it is equalled (except in cases of promotion from the same style of men,) by some of the Subordinate Native Judges who hear the Munsif's appeals."

Mr. Justice Markby said :—

"In discussing the important question now raised it will not be safe to disguise the truth, however unpalatable it may be; and that the Courts of appeal in Lower Bengal are frequently below them, it is I fear impossible to deny. I insert again here the opinions upon which in my former Minute I based this conclusion. None of these opinions have since been withdrawn. No opinion to the contrary has been since expressed. And my own more recent experience has strengthened me in the view that the conclusion I then stated and now repeat was correct."

Now he would not detain the Council by reading any more extracts, but after the testimony of these high authorities, it would be an ill recompense to the Subordinate Judges and Munsifs to put such restrictions on the power which they had so long enjoyed, and which as far as he was aware, they had never abused. If the Government would not trust these subordinate Courts, the people would naturally hesitate to place any confidence in them, and the effect of this section would be prejudicial to the administration of justice. It had been said that this section had been introduced to prevent unseemly conflicts between the Munsifs and the executive; but he did not understand why there should be any friction between the two classes. Both served the same Government, and both were appointed to administer the law; the members of one class were amenable to the other only when there was an infringement of the law, and even then the officer who tried the case was bound by the Code under which he acted, and he could not go beyond that. Some cases were cited in which it was alleged that the Munsifs were influenced by their bias

against the executive. He was not acquainted with the merits of these cases, and he could not therefore say how far those decisions were influenced by *animus* against the officers of Government, or were errors of judgment ; but he knew of other cases in which, although it was at first believed that the Munsifs were biased in their decisions, those very decisions were on appeal upheld by the highest tribunal. Mr. Justice Innes of Madras, commenting on this section of the Bill, said :—

“ Section 416 appears to be conceived in a similar spirit of distrust. It is certainly a retrograde step, and one much to be deprecated, that at a time when the Native Judicial service is in education and integrity so much in advance of what it was before the enactment of the present Procedure Code, the Legislature should revive a restriction of the jurisdiction of these officers, which is certainly, so far as my experience goes, not called for by their mode of dealing with suits of the kind referred to in this section, namely, suits by or against Government or public officers.”

Indeed he considered it very inconsistent, in the face of testimony of so many high authorities, as regards the integrity, conscientiousness, and efficiency of the subordinate judicial officers, to hold that they were likely to be biased in their judgment against the executive officers of the Government they served. It had also been urged that cases in which the Government or its officers were interested often involved questions of large and important public interest, and that the Munsifs were unable to form any opinion upon them. But in such cases he submitted the remedy was always ready at hand. Section 25 of the new Bill provided that any District Court might, on the application of either of the parties, or of its own motion, withdraw a suit from any Subordinate Court and try it itself, or transfer it to any other Court of competent jurisdiction. The Government therefore could on sufficient ground apply at any time for the transfer of a suit from the Munsif's Court. Further he submitted that it was not conducive to public interests to provide a special tribunal for the trial of suits in which Government or its officers were interested. Sir Richard Garth questioned if it was either necessary or desirable to withdraw all suits against public officers from the jurisdiction of the inferior Courts ; and His Honour the Lieutenant-Governor said that it seemed to him quite impossible for Government to say, as it did here that the Courts which it provided for the public were good enough for ordinary suitors, but not good enough for its officers. Under these circumstances he earnestly trusted that the Hon'ble Council in its wisdom would see fit to ex-

punge this section, which would otherwise remain a standing reproach upon a deserving class of officers, and have a most discouraging and disheartening effect upon them.

The Hon'ble Mr. Cockerell thought that the remarks which prefaced the amendment propounded by his hon'ble friend the Maharaja, would have been more in point if applied to the corresponding provisions of Bill No. IV in relation to the subject of the amendment.

His hon'ble friend had commented on the section which he desired to strike out of the Bill as though its effect was to take away absolutely the existing jurisdiction of the inferior Courts of first instance in respect to suits against the Government and public officers. That statement of the case would more or less correctly apply to the proposals of the former Bill in regard to this matter; but those proposals had undergone material modification, and all that was now desired was that the inferior should obtain the sanction of the superior Courts, ere proceeding to try suits of that class instituted before them.

He would further submit that in treating this matter as a question of the proved competency or otherwise of the inferior Courts, his hon'ble friend had narrowed very considerably the issue upon which the subject-matter of the amendment should be considered and dealt with by the Council. We were not now called upon—as it seemed to him (Mr. Cockerell)—to determine by our action in this matter whether these Courts were or were not competent to deal satisfactorily with this class of suits, but to determine a question of much wider character, and one that should be considered and decided on a much broader basis—namely on the grounds of the general public convenience—the advantage and pecuniary interest of the tax-paying community, and on such grounds he held that the provisions of the Bill before the Council should be maintained and the amendment of his hon'ble friend should not be accepted.

As regards the question of the established efficiency of our lower Civil Courts, and the extent to which they enjoyed the confidence of the people at large, there was no doubt a good deal to be said on both sides; for whilst on the one hand there had been very great improvement in the personal qualifications in the direction of a superior education and legal training, of the Judges of these Courts—and indeed he felt that it was almost presumptuous, and at least

superfluous, to offer any opinion or bear any personal testimony to a fact so clearly brought out in the recorded opinions of those who were, of course far more competent to speak authoritatively on such a subject, some of which opinions had been cited in the speech of his hon'ble friend the mover of the amendment—but on the other hand, in Bengal at least, there was evidence to show that these Courts were according to a well-informed section of public opinion far from having attained perfection.

So recently as the period—about two years ago—at which much public discussion took place in regard to the Bengal Civil Appeals Bill, it was urged very strongly that it was impolitic and inexpedient to take any action which would have the effect of curtailing the existing area of appeal whilst the majority of the Courts of first instance were in such an unsatisfactory condition, and that the essential first step towards a substantial reform of the administration of Civil justice was the amelioration of the character of the inferior Courts of original jurisdiction.

At a public meeting held he believed in the rooms, and under the auspices, of the distinguished Association with which the hon'ble mover of the amendment and another of their hon'ble colleagues (the Maharaja Narendra Krishna) were connected, this view of the question was strongly insisted on—a Bengalee gentleman of wide reputation who possessed large estates, with whom he (Mr. Cockerell) had the honor of having been acquainted for many years past, and whose personal experience and knowledge of the question then under discussion he believed to be unsurpassed, spoke on that occasion as follows :—

“ Our Munsiffs, who have to try a large number of original suits, and almost the whole class of suits between landlords and their tenants, are chiefly young University graduates, who have no knowledge of the world, and who are in many points as ignorant of the habits, customs, and feelings of the people as any European. They are usually required, after they have obtained their diploma in law, to practise in the High Court, or some Zillah Court, before they are appointed as Munsiffs. This should doubtless give them an insight into the working of the Courts, and to the practical operation of the laws, but as a matter of fact this condition is of very little use. Those who can secure good practice do not care to exchange their profession for the service, while it is only those whom we might describe in one word as “ *briefless*,” and who, after a short time, give up attending Courts, which entails some expense, that are appointed Munsiffs.”

That was the candidly expressed opinion, not of an European official too often credited with the indisposition, from selfish motives

to accord the full recognition and generous acknowledgment of the value of the services of his Native fellow-officials which those services may have merited, but of a fellow-countryman of the Native Judges themselves, and a fellow-countryman moreover whose opportunities for forming a correct judgment on the matter, and general competency to speak with some authority on such a subject, he (Mr. Cockerell) was sure that his hon'ble friend the Maharaja could not gainsay.

But as he had said before he did not think that the question before the Council ought to be determined upon this issue, and he had only referred to the subject for the purpose of showing that an argument against the amendment, even on the ground just stated, was not absolutely untenable. He had moreover cited the speech above mentioned in reference to what had passed when this Bill was last before the Council, on which occasion he had been rather severely taken to task by two Hon'ble Members, who seemed to think that their lengthened period of service and assumed intimate acquaintance with the people of this country entitled them to speak with paramount authority on such a question, for his remarks in regard to the personal characteristics of the Native Judges of our inferior Civil Courts in Bengal; he thought it right therefore, and in fact incumbent upon him in justice to himself, to appeal to the plainly declared opinion of one of their own countrymen, which had been delivered under the responsibility that attaches to public utterances, in corroboration of all that he had then advanced.

Passing now to the question as to how the disposal of this class of suits could be arranged so as to conduce most to the interest and advantage of the community, he would first ask, what there was in the way of novelty or innovation in the principle underlying the arrangement by which particular classes of suits or proceedings, or suits or proceedings affecting particular classes of persons, were reserved to particular Courts? He could point to several enactments by which the cognizance of particular kinds of suits and proceedings was reserved to special Courts or classes of Courts. So also institutions of suits or appeals were restricted to a few Courts only in certain cases. He would take an example of this, appeals against the decrees and orders of Munsifs. These appeals, though they might be, and in the majority of cases were, tried by Subordinate Judges, could be instituted in the district Court only. Or he might

refer to Small Cause Courts, which, although the Judges of these Courts were picked men of undoubted competency, had not jurisdiction even to attach immoveable property in execution of their decrees.

Indeed he might say that there was no class of Courts the jurisdiction of which was not restricted or limited in some direction; and his contention was therefore that the reservation of the cognizance of, or power to deal with, a particular class of suits to certain specified Courts, did not necessarily imply the disparagement of any other Courts to which such authority was not extended, and he hoped that the Council would not, from a too tender regard for the sensitiveness of Munsifs or any other class of Judges, or from any apprehension of popular misconstruction of the object of the change in the law contemplated by the Bill in its present shape, be induced to settle this question otherwise than on the broad grounds of sound policy and the general interests of the tax-payer.

In determining a question of this sort some regard should, he thought, be had to the generally important character as well as the comparative number of the suits which, as regards the choice of forum, it was proposed to deal with in an exceptional manner. Now there could be no question in his opinion as to the greater relative importance of these suits as compared with that of suits between private parties, whilst their number was comparatively insignificant.

From the sort of criticism that the action of Government was so often subjected to, the popular conception of it would seem to attribute to it a personal character, and that, moreover, of a not very creditable type; nevertheless the Government did not make an unscrupulous use of its power; it was not aggressive in its instincts, nor did it evince a tendency to encroach on or trample upon the rights of individuals. So far from this being the case as was so frequently, by implication at least, suggested, the Government was in fact in its appearance before the Courts, whether as prosecutor or defendant, no more nor less than the legal representative of the tax-paying community, endeavouring to protect the rights of that community which had been invaded or menaced by its opponent in the suit. Such being the case it would be natural to suppose that the support and sympathy of the public in such a contest would be on the side of the Government, whereas the exact reverse of this was found to be the case, and notoriously the Government, instead of



enjoying special advantages in the conduct of its litigation, might be said to litigate at great disadvantage. This fact was brought out clearly in the very small percentage of costs recovered in execution of its decrees.

Another important consideration in favour of the course proposed in the Bill was the increasing difficulty in regard to the maintenance of an adequate legal agency for the conduct of suits. If the Government must defend suits and carry on litigation, in every Civil Court in the country, it was evident that an expenditure for the maintenance of an adequate staff of Government Pleaders must be incurred which would be wholly unreasonable with reference to the object in view, and entail a burden upon the finances of the Empire, and consequently upon the tax-payer, which the exigencies of the case would not justify.

For these reasons he hoped that the amendment of his hon'ble friend, the Mahārājā would not be accepted.

The Hon'ble MAHARAJA NARENDRA KRISHNA said that it was with extreme diffidence he would venture to offer a few remarks on this Bill. It aimed at consolidating into one law all the enactments passed by the legislature from time to time for regulating the trial of civil suits. If even the legislature had confined itself strictly to the mere embodiment of the provisions of the old laws into one compact form, the opportunity should not have been lost of introducing improvements urgently needed, or of adopting modifications and omissions justified by past experience. But when there was obvious departure from this circumscribed course; when it was proposed to curtail the powers of some judicial officers and to increase those of others; when important changes in Civil Procedure were suggested, surely it behoved them to consider and discuss, not only the new points brought forward, but also to recommend important improvements which might occur to them, inasmuch as such a proceeding would obviate the inevitable necessity of re-discussing the consolidated Bill soon after it passed into law. He would observe in the first place that the terms of the contract between lender and borrower should always be allowed to be settled among themselves by laws based on the sound principles of equity and political economy. The capitalist, when he was forced to go to law to enforce the fulfilment of the terms of the contract, had to encounter difficulties of various sorts, and incur certain unavoidable expenses not recoverable

by law, up to the date of the realisation of his money. It would therefore be considered a grievance by the capitalist if the rate of interest contracted for was cut down after the decree at the discretion of the Court ; a proceeding which directly tended to over-ride the substantive law on the subject as provided in section 2 of Act XXVIII of 1855. The kind object of the legislature—to protect the helpless borrower—might be defeated by the lender exacting commission and other charges before granting the loan, knowing that the law would only sanction the legal rate of interest. He would therefore recommend that the substantive law in respect of the rate of interest be not interfered with by the present Bill. The Bill threw greater obstacles in the execution of decrees than formerly existed, as by section 230 the decree-holder must apply for its execution on or before three years from the date of a decree ; and if in the first execution he failed to realise any benefit therefrom, he would not be allowed a second execution, unless he proved to the satisfaction of the Court that he had exerted himself to give effect to it. This would in effect facilitate the evasion of the payment of a just debt, and would shield a fraudulent debtor. If the decree was kept alive by due measures the time for its execution should not be barred until after the expiration of twelve years.

His Excellency THE PRESIDENT said that he was unwilling to disturb or interrupt the Hon'ble Member, and had therefore not done so before, as he was under the impression that his hon'ble friend intended to move another amendment ; but he would beg to remind him that the Council had now before them the amendment proposed by Mahārājā Jotindra Mohan Tagore.

The Hon'ble MAHARAJA NARENDRA KRISHNA said that he had been making remarks on the general contents of the Bill. However as His Excellency had stated that it was the amendment only which was at present before the Council for consideration, he begged to state that he gave the amendment his unqualified support, as he failed to see that any evidence had been brought forward to enable the Council to form an opinion that the suits in question should not be tried by subordinate judges. It was a matter of regret that the country would very soon be deprived of the valuable services of the Hon'ble Sir Arthur Hobhouse ; the laws passed which he had the charge of had been generally received by the public with satisfaction. With high legal attainments he combined an earnest regard for the

welfare of the sons of the soil, and his approaching departure therefore would be felt by them as a great loss.

The Hon'ble Mr. HORS said that at this late hour he would only say a few words on the amendment which had been proposed. He perfectly agreed with his hon'ble friend Mr. Cockereil in the view he took, that in placing the question before the Council as if it were chiefly one of competency or incompetency of Munsifs or Native Judges generally, the hon'ble mover of the amendment rather placed it on a false issue. When on a former occasion certain remarks were made tending to suggest doubt as to the competency of the Munsifs, he himself spoke up in defence of them as far as regarded his own Presidency; and he should be ready to do the same on any future occasion. But that was not a matter with which they had any concern at present.

His hon'ble friend the Mahárájá, in commencing to justify the amendment, had spoken of the law as it existed in Bengal as if he were under the impression that the same law prevailed all over India; and it would appear that he was under the same sort of misapprehension as he had told the Council he was under in regard to the previous amendment which he had on the notice paper. But the second clause of this section might have reminded his hon'ble friend of his error. For instance, he might mention that the law in the Bombay Presidency was, and had been for a long series of years, that all Subordinate Judges were excluded from the trial of Government suits—and not only was that the case, but provisions to that effect which were inserted in the Bombay Revenue Jurisdiction Bill had been passed by the public, and by high official authority, without a single word of comment. His hon'ble friend apprehended that if the trial of these cases should be confined to too narrow limits, the public would hesitate to submit their own private concerns to the determination of the Subordinate Judges, and that it would be a standing blot against them. Now it was well-known that none of these consequences had ensued in the Presidency of Bombay, where this restriction was in force; on the contrary, we were frequently told that nothing could be higher than the position the Native Judges occupied amongst the people, notwithstanding they were under the disability which was now objected to.

With reference to the remarks which his hon'ble friend also made, that we should not have special tribunals for the trial of pub-

lie suits Mr. Hope might point out that Munsifs' Courts might, as it was, be called special tribunals, for they were subject to a money-limit as to jurisdiction ; and it appeared to him that there was no reason why they should be allowed to try cases against Government without limit of any kind when they were subjected to a prohibitive limit in another direction.

Moreover, the section of the Code which was under consideration was of a purely permissive nature. It did not prohibit the subordinate Courts from trying cases of the nature to which it referred. But it provided that when a case of this description came before such a Court, a certain time should be allowed during which the Government, if it thought necessary, might come forward and make any objection it might have to the case being so tried, and the decision on such objection would rest with the superior judicial tribunals. With reference to the allusion made to section 25, as giving the Government all the power it could require in this respect, he would state that, so far as his experience went, he believed it would be very much more difficult to bring the provisions of section 25 to bear on a case of this kind than to work section 417. Section 25 was intended to be applied as an exceptional and special remedy ; and it would not be considered by the District Courts as a sufficient reason for removing a suit from a Subordinate Court, to state that it was a suit of importance. In such a case the superior Court would hold that the Subordinate Court was empowered to try such cases ; and as no special reason for the application could be given, it would decline to remove the suit from the lower court. He was speaking in this matter from experience, as it had been his fate more than once to apply to a superior Court to have a Government suit withdrawn from a subordinate tribunal and to meet with a refusal. Even if the provision on this subject in Bill No. IV had been passed without alteration, it would have been nothing more than re-enacting the general law of Bombay, which had existed for a long time without any ill effects have been felt. But in the way the provision had now been put, it was merely a provision by which suits of great importance, or in respect to which strong local feeling existed, could be withdrawn from the cognizance of the Subordinate Courts ; and not only was the power of withdrawal as now provided less derogatory to the dignity of the presiding officer of the subordinate Court, but it would effect an immense saving in the matter of time and expense to the parties ; because, if

the case was a large and important one, it was not to be supposed that the Government would accept the verdict of the lowest Court, unless it were clearly shown that they were wrong: they would carry the case upwards even to the High Court.

The Hon'ble SIR JOHN STRACHEY said, if the amendment had been brought forward with an object the very opposite of that with which the amendment of the Hon'ble Member was made, and it had been proposed to take away altogether from the subordinate Courts the power of hearing suits against the Secretary of State in Council and the officers of the Government for acts done in their official capacity, he for his part should have given it his support. Amongst civilised nations, such as those which existed in some of the countries of Europe, the best safeguard against arbitrary and illegal acts on the part of the officers of Government was to give the Courts of law authority to decide between the persons who considered themselves aggrieved and the officers of Government. That was true where the Government was the servant and not the master of the people, and where both the people and the Government had perfect confidence in the Courts. But it seemed to him that that was by no means true in a country like India. He believed that through nearly the whole of India the people were quite incapable of understanding the idea that the proper way of giving to a man the means of redress for injury received at the hands of the Government, was to give him the power to bring a suit in a petty Civil Court. Sir John Strachey believed that if the man thought at all, which he certainly did not do on such a subject, the only light in which he could look on such a law was that it was another illustration of the strange fancies that his English Governors took into their heads.

He believed the law in regard to this matter to be wrong in principle. He quite admitted that it had done little or no harm in practice. The hon'ble member said that these powers had not been abused. Sir John Strachey had no doubt that that was perfectly true. But he thought it would be more correct to say that these powers had been little used, and consequently they had done no harm. Still he thought them wrong in principle, because he believed that the first object essential in this country was a strong executive authority. Giving power to petty Civil Courts to call in question acts of the executive authority gave as a matter of fact the people no means whatever of redress against injuries inflicted upon them. But to give

these powers to subordinate Courts had a distinct tendency to weaken that authority which it ought always to be our object to strengthen. This particular little section to which the hon'ble member objected, in Sir John Strachey's opinion, did not go half far enough. Still it was better than nothing, and he accepted it with a certain amount of thankfulness.

The Hon'ble Sir Alexander Arbuthnot intended to vote in favour of the amendment. He regarded this question, as his hon'ble friend Sir John Strachey regarded it; mainly from a political point of view. But the conclusions at which he arrived from a consideration of the question were, he regretted to say, essentially different from the conclusions at which his hon'ble colleague had arrived. It seemed to be admitted on all hands that no serious practical inconvenience of any sort had resulted from the state of the law as it now stood in the Statute-book. Had the section proposed by the Select Committee been embodied in the existing law; had it been in operation ever since the Code of Civil Procedure had been passed in 1859; had it been merely a re-enactment of a provision already in the Code, he should not have been disposed to advocate its removal. But he thought that the case was essentially different when it was suggested to remove from a body of useful public servants powers and jurisdiction which they had long exercised without apparently any perceptible disadvantage to the State. And when we had before us the evidence of numerous eminent judicial officers—and he thought he might add the evidence and opinion of numerous members of the official class not belonging to the judicial establishments of the country—that the efficiency of the subordinate Courts during the last twenty years had vastly and remarkably increased, he thought that, for the sake of what his hon'ble colleague regarded as a principle, which he himself regarded as an idea, but about which there might be a good deal of dispute—he thought that it would not be the part of wisdom that this Council should show that mistrust which would be indicated by the passing of this section as it now stood in the Bill, towards the particular class of judicial officers against whom it was directed.

His hon'ble colleague had more than once in the course of his speech designated these Courts as petty Civil Courts. They were of course Courts of inferior jurisdiction, but they were Courts of great importance and deserving of great consideration in connection with

the administration of justice. Our policy, our aim, and our desire had been for many years by every possible means in our power to raise and elevate the standard of these Courts. It was not denied that a great deal had been effected in that direction. There might be many difficulties; there probably were some inefficient Judges. But even in other ranks of the judiciary, instances of that sort were not wanting. And he deemed it to be a good and salutary principle that if you wanted to make people trustworthy, you should show them that you trusted them; and when you had indications of real and material improvement, then he thought that it was a mistake to pass any measure calculated to manifest a distrust which was not called for by the most urgent and practical reasons of State policy.

The Hon'ble SIR ARTHUR HOBHOUSE said:—"Perhaps it is because I have never been in the painful position in which my hon'ble friend Mr. Hope tells the Council he has often been placed, namely, as defendant to a suit, that I have never been able to satisfy myself that this is a question of very serious importance. Even if the clause stood as it was in Bill No. IV, I do not think it is very important. And that is shown by nobody being able to show any evidence of the ill-working of the law, either in Bengal where the subordinate Courts entertain these suits without restriction, or in Bombay where they are forbidden to entertain them at all. If the clause stood as in Bill No. IV, I confess I should not be able to maintain my ground against such an argument as we have heard from my hon'ble friend Mahárájá Jotindra Mohan Tagore. I have shown that conviction in the most practical way by succumbing to his arguments in Committee, and voting with him on his proposal to alter Bill No. IV. But it seems to me that the rule now laid down in Bill No. V gives a convenient rule of practice. It is one which will leave all petty suits of this kind to be decided in the Munsifs' Courts, and will give time to consider whether the more important suits shall be taken into the District Courts. My hon'ble friends have advanced arguments for this provision which I will not repeat. But there is one argument which seems to me worth consideration, and that is the argument which arises from the course of appeal. If a suit is decided in a Munsif's Court the appeal lies to the District Court, and the case does not reach the High Court excepting in that most unsatisfactory of all shapes, a special appeal. But if a suit is decided in the first instance in the District Court, then the appeal lies direct

to the High Court, which has the whole case before it and can decide according to the merits. I believe I am right in saying that my hon'ble friend the Maharaja Jotindra Mohan Tagore and those with whom he acts have the greatest confidence in the High Courts, and would be glad that cases of importance should be decided on their merits by those Courts. It is true that the District Court can call up a case when it thinks fit. But it is not nearly so likely to call up a case in the ordinary course as if there was a provision for a particular class of suits that notice should be given to it upon which it should make up its mind. It seems to me that this is a provision which is likely to operate as intended, namely, that important cases should be decided, as it is desirable they should be decided, by the higher tribunals, and that unimportant cases should continue to be tried, as they are now tried, by the subordinate Courts.

HIS HONOUR THE LIEUTENANT-GOVERNOR said he felt ashamed to take up the time of the Council at that late hour, but as his hon'ble friend Maharájá Jotindra Mohan Tagore had done him the honour to refer to him, he must say that he entirely agreed with his hon'ble friend in every word that he had said in support of the amendment. His Honour observed that during this discussion the whole of the arguments which had been used had been directed to the question of the Munsifs' Courts. But it was not only that class of officers who were placed under an implied ban, but the whole of the Subordinate Judges of the country were by this section to be branded as being unworthy to be trusted with the trial of suits in which Government servants were concerned. He thought it was very wrong in principle that the Government should now come forward, on no particular grounds, and state by implication that it considered that its Native Judges were not to be trusted to try cases in which the Government were concerned, although they were perfectly competent to try cases in which other classes were concerned, and claim for itself and its officers exceptional treatment in the Courts.

No doubt the section as it had now been amended was less open to objection than it was in the previous Bill, but it was still so worded as to throw a great slur on the whole of that valuable class of officers, the subordinate Judicial officers. For his part he thought nothing showed so clearly the good effect education had had in this country as the extraordinary improvement which had



taken place of late years in the efficiency and morality of the Subordinate Judges, and our judicial establishments generally; and he thought that no more unfitting time could have been chosen than this to cast such a slur upon a most deserving class of officers. His hon'ble friend Mr. Cockerell stated that cases of abuse of authority by Munsifs in trying Government suits, and hostility on their part to the executive officer, had become so frequent as to constitute a public scandal such as he considered would justify the passing of the provision now under discussion. His Honour had called for a return from the records of the Bengal Secretary's office of the number of cases which came before the Local Government, in which there was reason to suppose that officers of this class had abused their power, and he found that only two complaints of any kind had ever come under the notice of Government. One of these cases was the case of a Munsif who, acting with the concurrence of the District Judge, ordered the arrest of a Magistrate who had neglected to obey an injunction of the Court. That, His Honour admitted, was an unfortunate case; but cases of occasional abuse of authority were not confined to Munsifs or Native officers, and in this case Government would have gained nothing by the interference of the Judge, who, though consulted, never attempted to guide the Munsif to do otherwise than he did do, and must therefore be presumed to have thought him right. The case occurred many years ago and the Munsif was punished. The other case to which he referred occurred a short time ago, in which a Munsif gave a decree against an executive officer for interfering with what he believed to be an obstruction on the public highway. The case was appealed to the District Judge, who gave his decision to the same effect as the Munsif; so that there would have been no difference if that case had gone originally to the Judge instead of to the Munsif. From the decision of the Judge the case was appealed to the High Court, who decided that the Native Judge was right and the executive officer wrong. Therefore, the only two cases which His Honour had been able to find were entirely opposed to the assumption of his hon'ble friend Mr. Cockerell as to the present state of the law leading to judicial scandals. As far as His Honour was aware, there was no such scandal as that which had been alleged. If there was any thing of the sort, the records of Government would surely show it.

The only other reason which had been given for introducing this section—at least as far as regards its application to Bengal—was, that some similar section had existed in Bombay for many years. But he submitted that if that was the law in Bombay, the proper method of legislating was to bring Bombay forward to the state of things which was in force and which had worked so successfully here, and not to push Bengal back to the condition of things which existed in Bombay.

He could not altogether agree in what had fallen from his hon'ble friend Sir John Strachey, because, although His Honour agreed with him that it was most important to maintain a strong executive administration in this country, yet there was no way in which an Executive Government could better show its strength and its consciousness that its acts were all founded on a just consideration for the rights of others, than by its willingness to submit its conduct to the criticism of the Courts, and to stand before these Courts on terms of absolute equality with the humblest suitor.

The question being put,

The Council divided—

Ayes.

Maharaja Jotindro Mohun Tagore.  
Mr. Colvin.  
Mr. Bullen Smith.  
Maharaja Narendra Krishna.  
Sir A. Clarke.  
Sir. A. J. Arbuthnot.  
His Honour the Lieutenant-Governor.  
His Excellency the President.

Noes.

Mr. Cockerell.  
Mr. Cowie.  
Mr. Hope.  
Sir E. Johnson.  
Sir J. Strachey.  
Sir E. C. Bayley.  
Sir A. Hobhouse.

So the motion was carried.

The Council adjourned till Thursday the 29th March 1877.

The Council met at Government House on Thursday, the 29th March 1877.

The Hon'ble SIR EDWARD BAYLEY moved the following amendments :—

That in section 322, for clauses (b), (c) and (d), the following clauses be substituted :—

(b) by mortgaging the whole or any part of such property : or

(c) by selling part of such property : or

(d) by letting on farm or managing by himself or another the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale; or

(e) partly by one of such modes and partly by another or others of them.

He said that if Hon'ble Members would look at section 822 as at present amended, they would see that clauses (b) and (c) and (e) of the proposed amended section were counterparts of clauses in the present section. The whole force of the amendment lay in the clause which was lettered (d). As the section at present stood in the Bill, the Collector was authorized to do what the proposed amendment gave him power to do, *but only at the request of the decree-holder*, and in such case there was no limit of time according to the Bill as at present drawn to his management or interference. Sir Edward Bayley's proposed amendment was in effect to give the Collector this discretion without the consent of the decree-holder, but it limited the term of his management to a period of twenty years. The main object which particularly he had in view was the treatment of the very numerous class of petty holdings and rights in the Upper Provinces, which it was very difficult to deal with in any other way. As a matter of fact these rights were often attached for default of revenue, and he could recollect, amongst his earliest experiences, the late Mr. Thomason was ever urging upon all Revenue Officers the extreme expediency of adopting this course of procedure in preference to any other, that was to say, the expediency of satisfying the demand against the defaulter by transferring his share to the management of some coproprietor or fellow-sharer. The properties in themselves were very often mixed up with those of others, so that it was difficult to get any one except a fellow-villager to take them in mortgage; indeed a class of persons who were unused to the village system generally, could hardly afford to take them up in mortgage, but the villagers could usually manage such properties among themselves in some way or other together with their own holdings and make a profit by it. In fact this practice of managing the shares of others was a natural and indigenous arrangement which had always gone on with regard to absent sharers of every kind. If a man went on a pilgrimage, or enlisted, or left the village for any other reason, his share was usually made over to one or other of the shareholders in the village who dealt with it as the owner, paid his revenue and ordinarily managed his

domestic affairs for him. There was no law precisely on this subject; it had been a kind of natural arrangement, an arrangement on honour utilized for the mutual advantage of the people of the village. And in many cases the right of the absent shareholder had been protected in that way long beyond the periods of limitation. When Sir Edward Bayley had charge of the Kangra district shortly after it came under British rule, he found that during the previous government of the Sikhs and Goorkhas, large numbers of villagers had left in discontent and had sought refuge across the Sutlej in States under our protection. But when the Kangra district fell under the British Government these men returned. It was a long time however before they were all aware of the ameliorated condition of things at their own homes; some did not come back for eight or ten years after we occupied that district. Many had been absent twenty, thirty, forty, and fifty years, and in the meantime the regular settlement had been made in the Kangra district, and the rights of the absentees had been settled with others; but when these men came back, they invariably looked to receive back their property, and a practice instituted by his predecessor Mr. George Barnes was followed with great success. A man, for example, came back and said—"Forty years ago I left this village, and my rights were made over to such and such other persons." The claimant was referred to the Chief Revenue Officer of the district, who had instructions to take the claimant to his village and settle the case by voluntary agreement amongst the villagers, and in no single case was the right of these men ever refused. On the contrary, the right was acknowledged in spite of the lapse of many years, and in spite of the fact of a new settlement having been made giving to those others in possession a legal and usually indefeasible claim to the property. It was amongst that class of people the natural mode of helping absent shareholders; it had therefore been the practice we had adopted with great advantage in managing the estates of petty revenue defaulters; it was an extremely ancient practice, and it was more applicable to that class of cases than any other mode, and it seemed one, then, which it was wise and appropriate to adopt in realizing other demands besides those for arrears of revenue.

The objections to the proposal to give the Collector the power of adopting this mode of arrangement were of two classes. One

of the objections was that the management did not secure the immediate payment of the creditor, and that the creditor having got a decree for immediate and instant payment without regard to any other interest, was entitled to have the benefit of that immediate payment. This opinion Sir Edward Bayley knew was very strongly held by very many gentlemen. But he thought the speech of his hon'ble friend Sir Arthur Hobhouse the other day must have convinced them that it was a principle absolutely unknown to the English law—a principle which he might say was not recognized by law in any civilized country. It was a theory which had grown up, he believed, in India alone amongst a certain class of jurists who had not very wide experience of the principles of jurisprudence, and which they were pleased to think was a logical result of the doctrines of political economy. SIR EDWARD BAYLEY thought it could hardly be called the result of the doctrines of any science at all, much less of the doctrines of political economy. He did not himself see how such result was to be upheld without contravening the real principles of political economy, or applying them blindly, and without reference to the fitness of the application, to the facts of the case before the Council.

The other objection was that we should give a great deal of trouble to the Collector. He understood that there would probably be on the average about two hundred and fifty cases of execution of decrees against landed property made over to the Collector in each district of the North-Western Provinces where this class of cases was most likely to arise. It was not proposed, nor was it likely, that they should be all dealt with in this way. In some cases no doubt actual sale would take place; in others some of the various modes provided in this section of the Bill would be put into use. It would probably be only in cases of small petty holdings which were almost of no saleable value that the mode provided by clause (d) of his amended section would be employed: if these were left to any other process, it was a question even whether the creditor would in most cases ever realize his decree. Indeed such a mode of dealing with cases of this sort would ignore what Sir Edward Bayley thought he had shown to be the indigenous and natural and popular means of getting over such difficulties, the practice employed by the people themselves time out of mind, and

which gave a reasonable hope that the creditor himself might get his money sooner or later.

The extreme number of twenty years had been fixed for this process, because it was supposed that if the object of the management could not be effected in twenty years, there would be little hope that it could be effected at all. As a matter of fact twenty years was an extreme time. He believed that five, ten or fifteen years were the ordinary terms for which shares were put under management for default in payment of revenue. The amendment would of course include all the Provinces which had small tenures,—the Panjab, Oudh, and the greater part of the Central Provinces. He could not of course speak so confidently as regards other Provinces, such as Bombay and Madras. This mode might not be equally applicable to them. But it was quite competent to the Local Government to give a discretion to their Collectors as to the use of these powers, assuming that the sale of lands in execution of decrees was made over to them. He believed that in one or two large provinces—Madras and Bengal for instance—the agency of the Collector would probably be not employed at all. At any rate, it would only be in those particular instances in which this mode of procedure was applicable that it would be usually applied; and in those it only would be practically useful, and then probably it would be the only way in which the creditor would have a chance in most cases of realizing the full amount of his decree. He however regretted to say that clause had been struck out of the Bill in Committee under what he believed to be a misapprehension of its true character and probable effect, and he therefore at the time gave notice that he should move to re-introduce it on the present discussion of the Bill in Council. It was with this object that he moved the amendment. He might say a good deal more on the general principle of this clause, but he thought what had been said would be sufficient to allow the Council to understand the urgency of the reasons upon which he proceeded, and to enable the Council to judge of the expediency of restoring it.

The Hon'ble MAHARAJA JOTINDRA MOHAN TAGORE said that he did not pretend to any knowledge of jurisprudence, English or Indian; but speaking from a common-sense view of the question, he was one of those who thought that a creditor ought to have every reasonable facility for the recovery of his money at the time

stipulated in the contract entered into by his debtor. He fully appreciated the generous motive of the hon'ble mover of this amendment, but he was sorry he could not support a proposal which attempted to favour the debtor at the expense of an innocent third party. The judgment-creditor might have had to raise the money on the strength of his higher credit from some Bank or some other source, and might have advanced it to his debtor in the certain belief that he would receive back his money within the stipulated period, and thus be able to liquidate his own loan on the due date. There were many people in this country who advanced money in this way. But if the Collector were to step in and order the judgment-debtor to repay his debt by instalments spreading over twenty years, and that too without interest, it might be a great blessing to the debtor, but it would be absolute ruin to the honest creditor. It would be reversing the principle of the maxim, that one should be just before he was generous, if this amendment were accepted; for the Collector would have the sanction of the legislature to be generous before he was just. Besides this, he was not sure whether the amendment if passed would be altogether a boon to the class for whose benefit it was intended. The better class of capitalists would retire from the field and the money-lending business would be in the hands of less scrupulous men. The greater the obstacles thrown in the way of the execution of decrees, the more stringent would be the conditions imposed by the money-lenders to cover the risk which they would have to run. The effect of the amendment would, he feared, very likely be that no money would be advanced on mere credit, and those who required to borrow would be forced to mortgage their property and land or to sell them outright. For these reasons he was opposed to the amendment.

The Hon'ble Mr. COCKRELL said the hon'ble mover of the amendment had suggested the possibility of the Bill having assumed its present shape in Committee owing to some misapprehension on the part of the hon'ble members by whose vote its provisions in regard to the subject of the amendment were determined. He wished therefore to state for his own part, as one of the majority by whose opinions those provisions were regulated, to disclaim most emphatically any misapprehension as to their effect, and he proposed to confirm this statement by the vote which he would give to-day in the event of the Council dividing on the subject of the

amendment. The difference between the hon'ble member's amendment and the provisions of the Bill on this subject was simply this, that whereas the Bill would allow farming and managing for a period not exceeding twenty years where the decree-holder consented, the hon'ble member's amendment would allow of such a course whether the decree-holder consented or not. There was no other difference between the procedure of the Bill in regard to this matter and the proposals of the hon'ble mover of the amendment.

The hon'ble member who last addressed the Council had spoken of the hardship of postponing for such a long period the settlement of the decree-holder's claims without his consent, and had pointed out that there were conceivable cases in which such postponement would be almost tantamount to the ruin of the decree-holder. He (Mr. Cockerell) thought that this was probably not an exaggerated view of the case. Decree-holders were not necessarily always capitalists, who, so long as the security was good and the interest adequate, could afford to wait for the gradual repayment of their advances.

He believed that it was a not uncommon practice in this country—at all events it was so in Lower Bengal—for people to advance on good security, money which they had either themselves borrowed from others, or for the early return of which they had made themselves responsible, and if they did not recover their money so as to be in a position to replace it within the period upon which they had calculated, it was not too much to say that the consequence might be absolute ruin to them.

Where there was no such exigency for an early recovery of the amount advanced, it was reasonable to suppose that the legitimate influence of the Collector, which was recognized in Bengal to a considerable degree, and in the North-Western Provinces and in Bombay and Madras to an even greater extent, would be always found sufficient to effect an arrangement for the satisfaction of the decree-holder's claims by the process of gradual liquidation.

Hence it seemed to him that the distinctive feature of the amendment, as contrasted with the existing provision of the Bill, would—if the amendment prevailed—only come into operation in those cases in which it would be a *quasi* suicidal action on the part of the decree-holder to consent of his own free will to a protracted liquidation of his claim; and it was for the Council to consider



whether it would be justifiable to provide for the relief of the judgment-debtor to the extent of inflicting such possible injury on the decrees-holder, in circumstances for which it was fair to presume that the judgment-debtor rather than the decrees-holder was equitably responsible.

The Hon'ble MR. HOPKINS said the objection which was taken to the amendment by the two Hon'ble Members who had spoken reminded him somewhat of the objection which was made by one of them in the course of the discussion on section 417 yesterday, to the effect that if the course proposed was taken, some very dire consequences would ensue. He would remind the Council of the fact he laid before them then as to the dire consequences threatened in the event, of all classes of Courts not being allowed to try the highest classes of suits not involving money. We were now told that unless the clause was allowed to stand as it was at present, money-lenders stood a very poor chance of being repaid. The answer to that objection was essentially the same as the answer to the other. The answer to the objection against the other clause was that in the case of the Bombay Presidency the law was diametrically opposed to the law in the Lower Provinces, and yet none of those consequences had ensued. On the present question he would point out that hitherto in many of the Native States, some of which were admirably administered by most distinguished men, we did not find this severe law for the sale of land in execution of money-decrees and for imprisonment for debt, and yet the people managed to get loans, and money-lenders were not ruined at all. He thought it would be better if, instead of arguing on speculative and *a priori* grounds, we were to look at what was going on in these Native States. We were told that in most respects they were much behind us, but he thought that in these matters, in some matters connected with land-administration and everything in fact in which action to suit native peculiarities was concerned, they were indeed in advance of us. This had, he thought, been well brought out by the replies given to the question asked in 1867 regarding the relative merits of British and Native Rule, which had been printed in a Blue Book and laid before Parliament.

The Hon'ble SIR JOHN STRACHEY said:—"I do not wish to give an altogether silent vote in favour of the amendment of my hon'ble friend Sir Edward Bayley, because I think it the duty of

those who have for many years taken part in the actual every-day work of district and provincial administration, and who may be supposed to have thus obtained some practical acquaintance with the country and the people, not to remain silent on such a question as this, even when they feel that really nothing remains to be said about it. The question raised by this amendment is, I think, in reality the same as that on which my hon'ble friend Sir A. Hobhouse spoke yesterday with such admirable and convincing ability. My hon'ble friend performed by that speech a great public service. He put this most important question of the sale of land in execution of decrees in its true light, and while he has left nothing, I think, for those who agree with him to say, except indeed to express their admiration and gratitude, I am quite sure that he has left nothing to be said by those who disagree with him. I predict that my hon'ble friend, by his speech of yesterday, has closed for the present generation all controversy on this subject. That speech teaches us how we ought to vote on the amendment of my hon'ble friend Sir E. Bayley, for this amendment is the logical outcome of the principle which Sir A. Hobhouse explained to us yesterday, and which I hope I may assume that the unanimous voice of this Council has approved. If we admit that great social and political evils have to be remedied or prevented, and if we say that our Courts shall not be instruments for bringing undeserved misery and ruin upon debtors, and that we have to provide an authority which shall be able to bring about fair and equitable arrangements between debtors and creditors, it follows necessarily that the more we can in a reasonable way strengthen the hands of that authority, the more chance there will be that we shall succeed in the objects at which we aim. The provision in the Bill as it now stands, that it is only with the consent of the creditor that certain measures for saving the property of the debtor from being sold in execution of a decree can be adopted, is entirely opposed to the assumption with which we start. To say that the consent of the decree-holder shall be necessary is flatly to contradict the principle which we now desire to maintain. If the amendment of my hon'ble friend be carried, I believe that the single serious blot which now remains in this provision of the Bill will be removed; and the Council may then hope that the law has at last been put into a shape which will make it possible to carry out the object which the most experienced officers through-

out the greater part of India have been for years declaring to be of paramount importance, and which my hon'ble friend Sir A. Hobhouse told us yesterday will be in complete accordance with the intentions of the eminent men by whom the Code of Civil Procedure was framed. Having, my Lord, myself held almost every office, both in the Regulation and Non-regulation Provinces of Northern India, which a Member of the Civil Service ordinarily can hold, I have had perhaps better opportunities than most men, of at least making myself acquainted with the views which have been held on this subject by the most distinguished officers of the Government, and by the most intelligent members of the native community. I know of course that high authorities have thought otherwise; but even they I believe must admit that there is perhaps no great subject of public importance that can be named on which there has been so general a consensus of opinion in Northern India as there has been on this.

"There has no doubt been much discussion about the exact nature of the remedies to be applied, but almost every one has agreed that the unrestricted transfer of land to strangers in the execution of decrees for debt has led and is leading to much social misery and political danger. My own personal experience during the last thirty years or more enables me to confirm without hesitation the statement which was made yesterday by my hon'ble friend Sir A. Hobhouse, that this is a subject on which there has been no oscillation of opinion; and it seems to me impossible to suppose that all the eminent men who for a great number of years past have had the best possible opportunities of forming an opinion on the subject should have come to this practically unanimous conclusion without good reason.

"I think, my Lord, that the truth is that the authorities who have taken the other side of the question have sometimes been led astray by the mistaken application of true economical principles. The present case offers a good illustration of the way in which political economy gets a bad name without the least reason. The truth seems to me to be, in the present instance, that the principles of political economy do not in the very slightest degree teach us, that in Northern India, or in many other parts of India, there ought to be no interference with the sales of land in execution of decrees. What political economy does teach us in regard to this matter is

merely this abstract principle, that such interference tends *prima facie* to cause loss of wealth to the community. But a Political Economist, if he understands his own science rightly, does not go beyond this, and he may with complete consistency declare that there are other, and perhaps more important, considerations than those which his own science deals with, which render it wise to accept such loss; and he may even believe that neglect of those considerations will lead to loss of wealth still greater. I am convinced that such considerations exist in the present case. Political economy never teaches us to carry out theories without reference to facts. I deny that these provisions of the Bill are open to economical objections, and I believe that, with the amendment which my hon'ble friend Sir E. Bayley has now proposed, they will afford a very moderate, reasonable, but I hope sufficient, safeguard against serious evils without interfering with any true principles."

The Hon'ble SIR ARTHUR HOBHOUSE said:—"To a certain extent my hon'ble friend Sir John Strachey has anticipated what I was about to say. It seems to me, as it does to him, that those who have accepted as sound the general line of argument that I submitted to the Council yesterday should support my hon'ble friend Sir Edward Bayley's amendment. We must remember that those powers which the amendment would give to the Collector are already in the bosom of the law although they there lie almost unused. Section 243 of the existing Code gives to the Court unlimited power to manage property which is attached, and to pay the debt gradually out of the rents. It also gives to the Courts unlimited power to postpone the sale in order that the judgment-debtor himself may make arrangements, one of which arrangements is letting the property in farm. Section 224 contemplates that the Collector may exercise similar powers, though unfortunately it is coupled with the fatal proviso that security must then be given for the amount of the debt or the value of the land. Now of course it is quite competent to our opponents to say that although these powers are already in the law they are mischievous, and that we ought to strike them out. But if we accept the principle that the decree-holder is not, and ought not to be, the owner of his debtor's land to all intents and purposes, then such a power as the amendment contemplates is most essential. The other courses which the Collector may take are sale, mortgage, or letting on such terms as will raise money at once to pay the debt.

But these courses all proceed on the principle that the creditor has a right to have an immediate and full payment of his debt out of his debtor's land, and they all involve practically the alienation of the land. What we want is some course which does not involve the final and complete alienation of the land, but which more resembles that course adopted by the English law under the writ of *elegit* which I mentioned yesterday. Suppose the case of a country which is desolated by famine. The land there may for a considerable space of time be producing absolutely nothing, and if the creditor elects to have the land of the debtor sold immediately or disposed of in some other way which shall raise the whole amount of the debt immediately, the land may go for next to nothing, and the creditor may buy it in, as he usually does, for next to nothing. But if the land can be held on for a time, better times will come, and the land may produce something not only for the creditor but also for its owner. I should therefore be very sorry if the Council thought it right to strike out of the existing law these powers which are in it. But if it is not right to strike them out, surely it is right to make them living powers instead of dead powers. I gave the Council yesterday evidence to show how very inoperative these sections had been, and it is my confident belief that if such discretions as these are left entirely to legal officers acting in districts where the peasant defendants are ignorant, helpless, without skilled advice, and totally unable to urge the Court into action, so long they will not be of any very great use. In fact it may be said that a Court of law carries such powers as these

"As the flint bears fire,  
Which much enforced shows a hasty spark,  
And straight is cold again."

"Now our predecessors clearly saw that truth; they clearly saw that if they were to make these powers of use they must be committed to administrative hands and not only to legal hands. That is what I say now, and that is the effect of Sir Edward Bayley's amendment.

"The only alteration we are making in the principle of the law is that we do not require security to be given when the Collector has the management of the property. But as I understand the objection to the proposal, it is not grounded on the fear that the creditor will lose the security of the land, but on the hardship caused

by delay, and by keeping the creditor out of his money. Now the creditor is just as much kept out of his money whether security is given or not. By security we do not mean security that can be enforced during management: that would be an absurdity, and make the management totally nugatory. What is meant is that the creditor shall have security, which shall take effect after the management comes to an end, or, in case the land is sold under some paramount claim as for arrears of Government revenue. But such security as that is equally wanted when the Court has the management of the property. All the liabilities which may occur to the land in the hands of the Collector may equally occur to it when in the hands of the Court. No such security however is required if the Court has the management; and why it should be required because the Collector has the management I cannot conceive.

"Now I will make one or two remarks on the arguments which have been advanced against the amendment. I understand my hon'ble friend Maharaja Jotindra Mohun Tagore to rest his objection entirely on the right of the creditor to be paid at once and on the evils of delay; and as he said, if the Court has the power or the Collector has the power to order the debt to be paid by instalments, it will be a serious thing both to the lender and the borrower. Now the Court has the power under the Code, and has had the power at least since the year 1859—I do not know how long before—to direct any debt to be paid by instalments. Yet we have never heard that the money-market was disturbed by that power, or that either the lender or the borrower had been injured by the exercise of it.

"Then my hon'ble friend says that you will drive the honest and more respectable lenders out of the market and call in a class of men whom it is not advantageous to the borrower to call in. But that is a very speculative matter, and it is one to which the Dekkhan Commission have paid a good deal of attention. They give us an account of the classes and characters of money-lenders, and of the different ways in which different classes of lenders deal with borrowers; and the conclusion they come to is exactly the opposite to that to which my hon'ble friend comes. I do not say they are right; I am not competent to form an opinion. But I say that it is a purely conjectural matter, and I think that such arguments ought not to weigh with this Council one way or another.

"Then my hon'ble friend Mr. Cockarell says the small capitalists deal with capital which is not their own, but borrow for the purpose of lending again at a higher rate of interest. I am sorry to hear that the money-market is conducted on so rotten a system of dealing in money without capital, and I should be surprised to hear that the gentlemen who conduct their business in that way do not secure themselves by mortgages when they lend their money. The man who makes it his trade to borrow for the purpose of lending again is exactly the man who will secure himself by taking a mortgage. I think therefore we ought to know how that matter stands before we attach much weight to my hon'ble friend's argument.

"Then he tells us that the Collector's personal influence can effect such arrangements as are contemplated under this section. If that is so, surely it places the Collector in a more proper position to arm him with legal powers to do that which is a good thing, but which he now effects by some irregular, however beneficial, influence on the minds of the persons with whom he is brought into contact.

"I think it has not been sufficiently observed by those who oppose this amendment that these powers are not to take effect except in those cases in which there is reason to believe that the judgment-debts of the debtor can be discharged without the sale of the whole of the property. I cannot help thinking that the cases contemplated by my hon'ble friend Maharaja Jotindra Mohan Tagore and those who act with him are cases in which the property is in a hopeless state of insolvency. Those are not the cases in which the Collector is empowered to exercise the discretion which we propose to give to him. He has first to satisfy himself that the case is a *bond fide* one; that there is a property which if properly managed may satisfy the debt and leave something to the owner, but which, if it goes into the market at short notice and on peremptory sale, will be lost, with the result of ruining the debtor, perhaps without satisfying the creditor."

HIS HONOUR THE LIEUTENANT-GOVERNOR said that the section before the Council being entirely permissive, and being therefore not likely to affect the part of the country in which he was interested, he should not take up the time of the Council in discussing the general principle of this section. He believed that the provisions of the section were entirely inapplicable to the tenures of Bengal,

although it might be the case that they were absolutely necessary in some parts of the country of which he knew nothing. Therefore taking that view of the case, and accepting the assurance given by his hon'ble friend Sir John Strachey, that in Northern and Central India the provisions of these sections were really required, he should not oppose the amendment before the Council.

But he thought he might say a few words in regard to the probable practical working of these provisions, and to the allusions made during the discussion to the powers of the Revenue Courts to deal with the mass of business which would be thrown upon them. Judging from the experience of the Non-Regulation Provinces of Bengal, in which sections precisely similar to these had been applied by special Acts of Council, he thought that it would be found that the powers of the Collectors to deal with all cases which would come before them would be quite inadequate; and that the section could not be worked without a large increase of the Revenue-establishments. We had to work powers similar to these in certain districts of the Chutia Nagpur Division. He saw by a return before him that we had already 320 petty estates attached for debt in four districts, of which 167 were under the management of the Collector in one single district. In 89 cases the current annual demand was below Rs. 100 a year; in 87 cases it was above Rs. 100 and below Rs. 500. His Honour did not think it was one of the functions of the Government to take over the whole of the management of all the petty holdings of the country, and if the Government did do so, it would end by the Collectors being completely swamped with their work; for there was apparently scarcely an estate in the Dekhan and parts of Northern India in which there were not already some heavy debts.

The Hon'ble SIR EDWARD BAYLEY wished to make a few remarks in closing this discussion, and in doing so he would not detain the Council long. The remarks which his hon'ble colleagues Sir John Strachey and Sir Arthur Hobhouse had made practically disposed of the theoretical part of the objections that were brought forward against the amendment so effectually that he only should diminish their force if he attempted to add any thing to what they had said in that respect. He wished rather to remark on one or two points of detail which those who opposed the amendment seemed to have overlooked. As regards the effect on a creditor who him-



self was a borrower, he thought not only had it been overlooked that the power of directing the payment of a debt by instalments was no new one, for it existed in the old law long before the Code of 1859, but the provisions of this Bill were not confined to debts of any particular class; they extended to all debtors, and if the unfortunate man who had borrowed money to lend it out again found himself in a difficulty, he would at the same time find under the other provisions of this Act that the Courts had power to give him also a very large measure of relief, so as to enable him to pay his debts without being brought to absolute ruin.

As regards moreover the economical effect which these clauses were likely to have, his hon'ble friend Mr. Hope had very justly pointed out that that particular principle on which they were founded had to a great extent been acted upon in Native States, and had there produced no such evil results as were anticipated. But Sir Edward Bayley would add also that it had been shown by experience they could be worked with equal benefit in our own Provinces. This was the case notably in the Punjab. The spirit of this law had been practically in operation there from the day of the annexation until now. And what was the result there? Was the land less valuable? Were the tenants less solvent? Was the rate of interest higher? Was there, as a matter of fact, greater difficulty in obtaining credit by tenants in the Punjab than elsewhere? It so happened that enquiries had been, independently of the subject-matter of this Bill, recently made on these points, and the result of the enquiry showed that the peasantry were less indebted and in a more flourishing condition than perhaps in any other British Province. No difficulty was found by them in obtaining money, nor, as far as he knew, did they pay a higher rate of interest than elsewhere. The real fact seemed to be that a moderate and merciful application of the law was in the long run as much to the interest of the creditor-class as to that of the debtor-class; it was certainly to the advantage of the creditor to have to do with a prosperous, contented and substantial class of debtors, rather than with a pauperized and insolvent class. Sir Edward Bayley thought that the Dekkhan Riots Commission had shown how that in certain parts of the country to which their particular enquiries extended, the unrestricted action of the Civil Courts had, by various abuses, which he would not stop to discuss, actually been the main cause of pro-

ducing the complete pauperization of the agricultural community. This surely was a result most deeply to be regretted, and he was certain nothing could be worse for the interests of the creditors themselves than the state of things disclosed in that report. The object of this Bill was to do something to prevent a similar state of things arising elsewhere, and the clauses he now moved were intended to give more full effect to the principle which the Bill had generally adopted in regard to the execution of decrees, and specially as regards those for the sale of land, and to facilitate the application of that principle in regard to the more humble and more ignorant class of debtors.

As regards one other question, namely, the influence which the Collector exercised in restraining the action of creditors, he thought it had been so satisfactorily set at rest by the remarks of his hon'ble friend Sir Arthur Hobhouse, that he (Sir Edward Bayley) need hardly say more, except that there were many cases in which neither the Collector nor any body in the world had any power to effect any thing with an unreasonable and harsh creditor.

He had only further to notice the objection which his hon'ble friend the Lieutenant-Governor had raised from his own experience in the Santhal Purganas, as to the capability of the Collector practically to work the provisions of this section; his hon'ble friend had, he thought, overlooked one material difference between the Collectors in Bengal and those in other parts of the country. In Bengal the Collectors had not at their disposal the agency of the officers called tahsildars in the Upper Provinces, and mamlatdars in Bombay; they had not in fact the machinery which was used in other Provinces. As Sir Edward Bayley had said before, an exactly similar power was used in other parts of the country for recovering arrears of revenue, and the work was entirely done by the Collectors through tahsildars. Supposing there were on the average from 240 to 250 cases of execution against landed property a year in each Collectorate, probably to not one in twenty of these on the average would this particular procedure be applied. The work which it imposed on each tahsildar would probably not be more than six or seven hours a year in each case, and probably each tahsildar would at the outside never have more than fifteen or twenty such cases, and the supervising work of the Collector would not occupy him altogether more than one whole day in the year. Of course if there

was no such machinery in any particular Province, this clause would be inapplicable; and if it were desired to use it more effectually in the Santhal Parganas, it might be necessary to provide the Collector with better machinery. But that was no argument against the policy indicated by these clauses, nor against their introduction in places where the machinery already existed in complete working order, as it did in the Provinces to which the operation of these clauses was more particularly suited.

The Motion was put and agreed to.

The Hon'ble Mr. Hope moved the following amendments:—

That the following clauses be added to section 336:—

“The Local Government may, by notification published in the official Gazette, direct that whenever a judgment-debtor is arrested in execution of a decree for money and brought before the Court under this section, the Court shall inform him that he may apply under chapter XX to be declared an insolvent, and that he will be discharged if he has not committed any act of bad faith regarding the subject of his application, and if he places all his property in possession of a receiver appointed by the Court,

“If after such publication the judgment-debtor express his intention so to apply, and if he furnish sufficient security that he will appear when called upon, and that he will within one month apply under section 344 to be declared an insolvent, the Court shall release him from arrest:

“But if he fails so to apply, the Court may either direct the security to be realized or commit him to jail in execution of the decree.”

He said that the hon'ble mover of the Bill, now under consideration, yesterday expressed the opinion, or at any rate quoted from elsewhere with approval the opinion, that the Indian law with reference to debtor and creditor was the most severe and anomalous in the world. The creditor was able to proceed against the property, not only present but future, and also against the person of the debtor. There was only one small door left open—a door which indeed had been slightly enlarged by the amended form of the present Bill, but which still was an exceedingly small one, he meant the door of the insolvent clauses. Under the Bill as it was now before the Council, a man, if he chose to make a declaration of insolvency, could obtain a release from imprisonment, and if his debt did not exceed a certain small sum the Court could give him his liberty for the future altogether. But it had been proved to be the fact in some parts of India that a very large proportion of debtors were absolutely unacquainted with the existence of this door. In the document which had been so frequently referred to the Report

of the Dekkhan Riots Commission, it was stated of debtors arrested—

“That they may on certain conditions get free, or that the term of imprisonment is not absolutely of unlimited duration and hardship, is also as a rule unknown to them.”

And in consequence of that there arose a very large number of evils, which he did not mean to recapitulate, caused by the fear of being so imprisoned. The Commission consequently recommended that when a man was brought up before the Court in the first instance on a warrant of arrest, care should be taken that he was made acquainted with this mode by which he could be saved the ignominy which he so excessively dreaded. As regards Bombay this recommendation had considerable force, more than as regards other Provinces, owing to the large abuse of these powers in that Presidency. It was not an impossible thing for a Subordinate Judge's Court to be eighty or a hundred miles from that of the District Judge or the Civil jail. A man brought before the Subordinate Judge was not only imprisoned, but sent off to a distant jail before in practice he could declare to the Judge his wish to become an insolvent. A large proportion of these debtors were ignorant people who very seldom left their village and could not take advantage of the insolvency clauses, until they had preformed this long and terrible journey. In order to support their recommendation the Dekkhan Riots Commission pointed out that in 1872, out of 1,877 persons who were imprisoned, only 76 took the benefit of the Insolvent Act. The force of this fact could be best appreciated by bearing in mind another fact, that in 99 cases out of 100 these people had no property whatever. The Commission pointed this out. They said—

“If, as is the case with the agricultural ryot of the Dekkhan, the debtor is a man with an established residence to which he is bound by the strongest ties; if his property is such that it is easily ascertainable and in great measure impossible to conceal; and if such frauds as he may be tempted to commit in order to evade payment are punishable under the criminal law, the necessity for the alternative method of securing his property in payment is reduced to a minimum.”

So that we might fairly infer that very large proportion of these 1,800 men who were sent to jail, and who had no property, did not get out simply because they were not aware of the advantage which the law gave them. The object of the amendment therefore was to impose on Courts of first instance the duty of simply in-

forming the debtor that there were these provisions for his avoiding being sent to jail, provided he chose to take advantage of them. And the clauses had, with the assistance of the learned Secretary, been so framed as to give sufficient security against this power being made use of in a fraudulent manner, because it would be necessary, when the debtor expressed his intention to become an insolvent, that he should take the proper steps, to do so in a certain time, and if he did not, the security would be debarred. Mr. Hope was well aware that it was one of the practical features of the whole question that there were enormous differences between one part of India and another. On this ground he had, at the suggestion of the hon'ble mover of the Bill, made a slight amendment in the terms of his amendment as it was originally laid before the Council. The effect would be that instead of the clause being applicable to all parts of India, it would only have effect in such districts as the Local Government might think necessary. He trusted that in this modified form, which was designed to ensure the intention of the law being carried out, it would meet with acceptance at the hands of the Council. He trusted also that the case would not be injured by his endeavour to compress what he had to say into a small compass.

The Hon'ble MAHARAJA JOTINDRA MOHAN TAGORE said that in a country where the *benami* system prevailed to a large extent, the facilities for fraudulent transfers of property were necessarily great, and the dread of imprisonment acted as a wholesome check upon dishonest debtors. If the proposed amendment was accepted, it would in a great measure remove that check; for if every time as a rule the Court were to expound the law of insolvency whenever debtors were brought under arrest, it would in many instances be construed that it had a leaning towards the debtors, and that it was the wish of the Court that the debtors should declare themselves insolvents; the effect would be to encourage indirectly fraudulent transactions over the country. It would be far better to declare openly that there was to be no more imprisonment for debt than that the judgment-creditor should be led to undergo all expense and trouble for the purpose of arresting his debtor, in order that the Court might read to him a homily on Chapter XX of the Code, and then release him from imprisonment. But he saw that the amendment as now proposed to be altered was to be permissive in its character, and he had every hope that the responsible head of the

Bengal Government would never see reason to extend it to Bengal.

The Motion was put and agreed to.

The Hon'ble SIR ARTHUR HOBHOUSE moved that the Bill as amended be passed. He said :— "Before this Bill is dismissed into the outer world with all its imperfections on its head, I have one or two observations to make, but they will not be very long. First, the Council will observe that we propose that it shall come into force on the first of October 1877. That seems a long way off. But it must be remembered that the Bill has to be translated, and many persons have to make themselves acquainted with its contents; and therefore the time proposed is not likely to be found too much. Indeed it is more likely to be found too little, as in the case of the Criminal Procedure Code the operation of which had to be postponed. The intervening time is also very useful in another way, because in the hurry of printing and general hurry of work at the last moment mistakes must be made, which may be found out in the process of translation or the other processes through which an Act has to pass between the time of passing and of coming into operation. Opportunity is thus afforded of introducing amendments before the mistakes have caused inconvenience.

"There is still one section in the Bill connected with the vexed question of sales of land, on which I should like to offer some explanation. This is section 427, my remarks upon which I designedly postponed yesterday, because I thought my hon'ble friend Maharaja Jotindra Mohan Tagore was about to move to expunge it, and I conceived it would be more proper to state then how the Bill stood in that respect. It is the more necessary to explain, because it looks as if it gives the executive some very large powers, whereas in point of fact it does not give them powers much larger than they possess at the present moment. It provides that the Local Government, with the sanction of the Governor-General-in-Council, may make special rules for any local area, imposing conditions in respect of sales of any class of interests in land in execution of decrees for money, where such interests are so uncertain or undetermined as in the opinion of the Local Government to make it impossible to fix their value. In our Bill No. III that provision ran thus, that the Executive Government may make special rules imposing conditions in respect to the sale of land in execution of decrees from money. What was contemplated was that the Local Governments would

make some conditions of the kind which prevail in the Non-Regulation Provinces. We did not at the time see our way to making the rules ourselves, nor did we see our way to do so until we got information from the Local Governments and authorities, particularly the Governments of Bombay and Bengal. Now we have made special rules for ourselves, namely, the rules we have just been discussing. It will therefore not be advisable to leave in the Bill a general power to make rules when we have made rules ourselves, for the power might over-ride the rules made by the Council. But we do give power to make special rules in one particular class of cases. That was proposed in Bill No. IV, and the power was carried further, because it was then said that the Local Governments, acting in concert with the Governor-General-in-Council, may make rules imposing conditions on sales of land or prohibiting sales of land, not only where the interests in such land are uncertain or undetermined, but where for reasons of State the Local Government thinks that such class of interests should not be compulsorily transferable. Now we have left that out of Bill No. V, and we have only given power to make special rules where interests in land are so uncertain or undetermined as to make it impossible to fix their value. With that power and with the clause which enables the executive to transfer the execution of decrees to the Collector, we hope that all cases can be met which we contemplate providing for by legislation. I mentioned at Simla that the power of prohibiting sales was intended to meet cases where the nature of the interests in land was extremely obscure, very valuable to the actual cultivator but worth nothing in the market, and I illustrated the position by reference to what is going on in the Central Provinces. However on consideration we thought that so wide a power need not be given for so limited an object; so the power has been materially cut down, and the provision stands in the simple form in which the Council see it.

"The latter part of the section says that if any special rules for sales of land in execution of decrees are in force in any Province, the Local Government may continue such rules or modify them. That in effect is only a power which the Local Governments in question have already.

"I explained yesterday what alteration was made in the Code almost immediately after it was passed for the purpose of enabling the Local Governments to check indiscriminate sales of land. The

check has been applied in this form, that sales shall not take place without the consent of some executive authority. Of course that consent may be given on any conditions, for the power of withholding it can always be exercised at discretion. These conditions have been specified by different rules in different places. Still there remains the absolute discretion vested in the Government which carries in *gremio* the power of making rules and conditions from time to time. So that the provision I am commenting on really gives no more power than the Local Governments of the territories subject to these special rules possess at the present moment, but only gives them what is given in the Code of 1859 as it was amended within four months after its passing.

"I do not think there is any other point I need bring to the notice of the Council specially."

The Hon'ble MAHARAJAH NARENDRA KRISHNA requested that the remarks which he had made on the 28th March in the course of the debate on the Civil Procedure Bill be taken to form a part of this day's proceedings.

The Hon'ble Mr. HOPE was sorry to appear again as an offender by taking up the time of the Council, but as he was one of the signatories to the Report of the Select Committee, he thought it only due to himself to state that he had not done so wholly without reservation. One of the ablest, most courteous and most practical among the critics who had given them the benefit of their advice on this Bill, Mr. Justice Turner, had been pleased to designate those who thought as Mr. Hope did as the party of interference. Now he ventured to think that those who interfered were those who innovated, who introduced something new and contrary to all previous custom, and it was evident that Mr. Justice Turner also took the word in that sense. The English might well call themselves interferers in India, and he thought those might justly be called the party of interference, or innovators, who commenced by a law to upset all the relations which had existed between debtor and creditor, for many centuries previously. Those seemed to him properly to be interferers or innovators who first of all introduced the petty details of the English law in the Presidency-towns and produced the results which were so ably sketched in Lord Macaulay's well-known Essay, and those who year by year carried out the same policy in the mufassal, and made our judicial system that minute, elaborate, complicated,



costly and dilatory machine that it was. He did not mean to deny that to a considerable extent the alterations introduced might have been good. There were certain principles which lay at the bottom of all sound law, and their recognition was an advantage which all who had to do with the subject must recognise.

But it seemed to him that the test of all measures was success. If innovation turned out to be a success, then it was called improvement, and all were glad that it should be so. But if it turned out otherwise, then it was naturally and very properly stigmatized as interference. Tried by this test he claimed that the law of the English as to debtors and creditors had been a conspicuous failure, and in proof he would point to the ever-increasing wave of objection which came rolling in. Not only did our public records during the last twenty or thirty years show perpetual differences and discussions and references carried on in almost all the Governments in India between all the highest authorities, but our Statute-book bore the same evidence in the number of special laws which it had been found necessary to introduce,—laws which he saw the critic to whom he referred looked on with regret. The same was also evident in the numerous exceptions which existed in the Civil Procedure Code and which were preserved in the present Bill, such as the exemption of the Punjab and Central Provinces from some of the more important provisions, including even the very power regarding land to which the Hon'ble Maharaja Jotindra Mohan Tagore recently referred. Mr. Justice Turner had been so good as to designate this party of interference as a numerous body of gentlemen, but to deny to them the title of a "school of political thought" Mr. Hope was very content to accept the humbler designation. He was thankful that the number of those who thought with him was large, as admitted by his critic, and that it was increasing. He was not ashamed to be found on the ground of practical action, rather than up among the clouds of imagination, to be driven hither and thither by higher currents. The characteristic of this wave of objection was that it applied to some parts of India and not perhaps with any force at all to other parts of the country. This was naturally to be expected from the wondrous diversity of nations and circumstances, which had been so well described by his hon'ble friend Sir John Strachey, and which led Mr. Bright to propose the division of India into separate provinces

independent of each other. Mr. Hope thought that the proper remedy was to have separate chapters and clauses applicable to different parts of India. In this way we could provide against the risk of enforcing in any place what was not applicable to it. In the course of the sittings in Committee he had been endeavouring to urge these opinions, and he was extremely indebted to the forbearance of his colleagues upon whom he had endeavoured to enforce views in which they could not agree. He had been at a disadvantage owing to the fact that the Dekkhan Commissioners' report was not officially before the Committee, and that its contents were therefore not thoroughly before known except to the hon'ble mover, who took a good deal of trouble to master them.

As regards this question of sales of land in execution of decrees it seemed to him that the proper course was to provide a permissive clause, and that had been done to a certain extent. He could only regret the omission of the clause (327 (b) of Bill No. IV) which allowed the Government to prohibit absolutely sales of land in certain districts. That gave a larger degree of power than the clause which we had succeeded in preserving, and a power which he thought it was fairer to have, on the face of the Statute-book, than the undefined power of at any time upsetting the whole law by some special Act.

As regards what might follow a decree besides touching immovable property, the most important question was imprisonment for debt. Our law here was most barbarous; it was admitted to be most severe. The enormous evils which that mode of endeavouring to recover property from the debtor were well described in this same report, a report which was not merely a report of the state of circumstances in the Bombay Presidency, but summarised all previous discussions in other parts of India; and it was with regret that he saw that it was not possible to take any advanced step in the present Bill towards the abolition of imprisonment.

He had made these remarks merely to qualify his own signature to the report of the Select Committee. He was aware that in a large number of matters the Bill was an immense improvement, and he was extremely glad that it had fallen to the Hon'ble Mover to complete this work in which he had taken so much interest. Mr. Hope was glad to mark the progress of the views which he had advanced. They derived immense support from the admirable

speech of Sir A. Hobhouse. He was aware that he must trust to time, which as he had remarked on another occasion, had already done so much for law-reform. He only hoped we might not eventually owe their triumph to any popular rising, such as that of the Santhals, or more recently the Dekkhan riots, or to such disturbances as were witnessed by Sir William Muir after the outbreak of 1857, when whole lines of villages were seen in flames, where the villagers had risen and murdered those who had ousted them through the Civil Courts. If he was indulging in any vaticination in looking forward to the ultimate success of his principles, he could only plead the distinguished examples of looking to the future which had been set him during the last few days, and the fact that in the present debate the part of Cassandra had remained unfilled.

The Hon'ble Sir Edward Bayley wished to say a few words on one subject only, namely, the law of imprisonment for debt. He cordially acknowledged the very many improvements which this Bill would introduce into our Civil Procedure. The evidence which was laid before the Council did establish the fact that although the procedure of 1859 was in itself an enormous improvement upon that which preceded it, still it left open several doors by which very great fraud, cruelty and oppression had been practised through the agency of our Courts. The particular instances which had been brought to notice by the Dekkhan Riots Commission were perhaps crucial instances of abuses which had been perpetrated by the agency of the judicial administration of the country. He thought no one could read the evidence given before the Commission without feeling indignant that such things could have taken place under British rule. He did not wonder at the unfortunate men who were subjected to such proceedings rising up in utter despair against their oppressors. He could only say that it redounded very much to their patience and respect for the law, that they proceeded no farther than they did. Some of the measures which the Bill introduced would go, he trusted, far to make impossible such cruelty in the future. But he thought the Riots Commission had satisfactorily shown that the power of imprisonment for debt was one of the agencies which had been most abused, and which had, so abused, most actively contributed to the terrible result which ensued. He himself when he entered into the discussions upon this Bill was quite unprepared to take into consideration the expediency of the abolition

of imprisonment for debt. But he had in the course of those discussions seen the horrible abuses to which that power could be twisted, and he now felt that it was one which was most dangerous and pernicious. He believed himself moreover that it was an utterly unnecessary power. His hon'ble friends, the Native Members of Council, had both spoken of the necessity of retaining it as a remedy against fraud; they spoke no doubt of what they saw as regards their own part of the country. But he believed he was able to oppose to that an authority relating to the same part of the country, which he thought it would be admitted was of no less weight, he meant the learned Advocate General of Bengal, Mr. Paul. That gentleman said :—

“I am an advocate for the abolition of imprisonment for debt, and I entirely concur in and support the views held by the Hon'ble Mr. Hope. During an experience of Mufassal Courts and cases for the last fifteen years, I do not remember meeting with a single case in which I have been engaged where an application have been made for the imprisonment of the debtor, but no doubt there are cases in which such applications have been made and debtors have been imprisoned. I merely refer to my experience as showing that mode of enforcing decrees is not ordinarily pursued, and that its abolition will not entail any serious mischief or harm. I am fully satisfied that the process of imprisonment for debt is resorted to, either as a vindictive measure or as a means to extort money from the relations of the debtor, or to oppress the debtor for some purpose other than obtaining merely the monetary redress covered by the decree.”

That opinion had been supported by the Madras Government which had also recently proposed the total abolition of imprisonment for debt, and it fell to him during the operations relating to the proclamation of Her Majesty as Empress, to take an account of the number of petty cases in which prisoners were actually lying in jail for debts of small amount: they were very few—he was surprised to find how few—all over the country. As a matter of fact therefore it was a power which in most parts of the country was hardly used at all, even as the law now existed. As the Bill was framed it had cut down the period of imprisonment so materially that it could no longer act as a deterrent to a man who was inclined to be fraudulent or recalcitrant: the only deterrent effect it could have was upon an honest but unfortunate debtor, and those were not the men to whom it ought to be made applicable.

SIR EDWARD BAYLEY therefore announced himself a convert to the doctrine of abolition of imprisonment for debt. Imprisonment for debt was, he felt utterly unsuited to the circumstances of

the country, and it was capable of being applied to the most cruel purposes. He should therefore have considered it his duty, even at this late stage, to move for the omission of the clauses which provided for it in the present Bill, although they had been in some respects modified and made less severe. But there was one particular difficulty connected with its abolition, namely the present state of the law of insolvency. He quite admitted that if imprisonment for debt were abolished, it would be necessary to enter into the consideration of a total reconstruction of the Insolvency law. But that would demand much time and discussion and involve the passing of a very considerable measure. He could not hope that it would be possible to take it into consideration in connection with the present Bill. He did hope however that his learned friend who would succeed Sir Arthur Hobhouse might find leisure at an early period to bring in an amended Code of Insolvency, together with a provision for the total abolition of the practice of imprisonment for debt.

His Excellency THE PRESIDENT said :—" I am reluctant to allow a measure so important as the present Bill to pass into law and become a substantive part of the Indian Statute-book, without at least a word of good speed from the President of this Council.

"But after listening yesterday to the masterly speech of my hon'ble friend Sir Arthur Hobhouse, I felt, what appears to have been felt equally by our hon'ble colleague Sir John Strachey, that that nothing had been left for any of us to say of the slightest practical value on behalf of this Bill.

"I think, indeed, I cannot do better than imitate the judicious example of that civic worthy, I believe he was a Mayor of Liverpool, who, having to speak on some public question after Edmund Burke, condensed his own eloquence into three words, and said, "ditto to Mr. Burke." I say "ditto to Sir Arthur Hobhouse." The same has already been said in a more emphatic form by another hon'ble member of this Council. For, of the six amendments of which he had given notice, my hon'ble friend Maharaja Jotindra Mohun Tagore, after listening to what he justly called the exhaustive statement of my hon'ble colleague, immediately withdrew five, and I think that his withdrawal of these five amendments was a most emphatic ditto to Sir Arthur Hobhouse. It is also, I think, creditable to the care with which this Bill has been drafted, or perhaps I should rather say with which it has been considered in Committee, that on the sixth and

only amendment moved by my hon'ble friend the Maharaja, the opinions of the Council were so nicely balanced and so narrowly divided that the amendment was only carried by a single vote, and that vote I believe was my own. I gave it because I thought my hon'ble friend had established his contention that we have before us no sufficient evidence to justify us in withdrawing from a very painstaking body of judicial officers functions which they have hitherto exercised with promising intelligence and discretion.

"My hon'ble colleague, whose modesty takes, I think, a too Sadducean view of the immortality of his fame, disavowed and repudiated all claim to the special connection of his own name with the measure which we hope to pass into law today. But he may, I think, be congratulated,—and I do congratulate him—on the fact that he has been able before leaving India to bequeath to India so valuable a result of his latest labours, which have, I know, been most arduous. And I think that every Member of this Council may also be congratulated on the fact that my hon'ble colleague has bequeathed to us the recollection of one of the most brilliant orations, one of the most lucid, logical, and complete expositions, to which I have ever had the pleasure of listening, even from himself on all the facts and bearings of a legal question specially important to this country.

"To say the truth I could not help feeling when I listened to what seemed to me his unanswerable arguments, that they would suffice to cover and to justify legislation much more copious and forcible than any which is contained within the four corners of the few and moderate clauses of this Bill which regulate the relations between debtor and creditor.

"And I have no doubt that if hereafter further legislation in the same direction be found necessary, future legislators will refer to the speech of my hon'ble colleague Sir Arthur Hobhouse as a high authority in favor of such legislation. I must frankly confess that if the amendment of my hon'ble friend Sir Edward Bayley had not been carried, as I am thankful to say it has been carried by a nearly unanimous Council, this Bill would have passed into law with what I, for one, should have considered a very serious—indeed, I may say, a very discreditable—defect in it.

"My hon'ble colleague Sir John Strachey most properly and appropriately vindicated the science of political economy from much of the nonsense we so often hear put forth in its name. Political

economy is simply that science which enables us to understand and to practise the laws which govern the creation and accumulation of wealth. But it has nothing whatever to do with the laws which govern the distribution of wealth. I think that one of the first and most important considerations which practical legislators are bound to bear in mind when dealing with the subject to which the amendment of my hon'ble friend has special reference is, not what are the laws of political economy, but what are the actual facts to which they are to be applied; what are the interests and social circumstances which will be affected by their legislation, and whether those social conditions are of a character which a wise statesman would desire to encourage and possibly to extend, or to restrain and restrict. That being the case, the only objection I have heard made to the amendment of my hon'ble friend is one that surprises me; for it amounts to this, that his amendment, if carried, would have the effect of ridding the community, or at least the community of Bengal, of the existence, or at least the unrestrained activity, of a class which I confess appears to me to be about one of the most worthless, mischievous nuisances by which any community was ever infested—a class of needy usurers who have no capital of their own, who borrow at one rate of interest in order to invest their borrowed money at a higher rate, in speculating on the plunder of the agricultural community. I do not think it is necessary further to notice such an objection.

“I had also great satisfaction in voting for the amendment of hon'ble friend Mr. Hope. I entirely concur in the principle embodied in that amendment. My hon'ble friend referred to Mr. Justice Turner in terms which were not exactly those of appreciation. But I am quite certain that whatever may be thought of the abstract views and opinions of Mr. Justice Turner, every one who has practically had to do with the preparation of this Bill must feel that it is indebted to Mr. Turner for most valuable assistance; and I think it is fair to record the fact that to the revision of this Code he has sacrificed not only much valuable time, but also much hard-earned leisure.

“I am sure that I only express the feelings of all my colleagues when I add to those of Sir Arthur Hobhouse the expression of our collective thanks for the care and thought and consummate knowledge of statute law, which have been bestowed upon the preparation

of this Bill by my friend Mr. Stokes, whom we shall all be proud to welcome to his well-won place at the head of that great department of our Government with which he has been so long and so worthily associated. I also beg to join in the tribute of gratitude so eloquently rendered by Sir Arthur Hobhouse, to my honourable friend Mr. Cookerell, to the Chief Justice Sir Richard Garth, and many other high judicial authorities, as well as to all the Local Governments, on behalf of this Bill.

"This Code of Civil Procedure, which we hope to pass into law to-day, may at first sight seem to constitute an enormous addition to the Indian Statute-book, but an examination of its details will show that, although the body of the Code contains no less than 652 sections, it repeals as many as 575 sections of other enactments. Therefore the addition made by it to our Statute-book represents only about 70 sections. But although this addition is not enormous, it is, I think, important, for it provides for many matters which have hitherto been, either not at all or inadequately provided for. It provides, for instance, for interrogatories, affidavits, foreign judgments, *lis pendens*, admission of documents, administration-suits, suits for dissolution of partnership, insolvency, commissions to make partitions, suits by and against minors and lunatics, interpleader, suits relating to public charities, and several others, amongst which I may specially mention suits against foreign Rulers, section 433. This last-named section of the Code will, I have no doubt, prove generally satisfactory to Native Chiefs, or Princes, carrying on commercial relations with British subjects, as it supersedes the present unsatisfactory manner of adjusting disputes in such cases, and provides certain and easily accessible remedies for breach of contract. The other sections of the Code which have been so lucidly explained by my hon'ble friend Sir Arthur Hobhouse, do not call for any special remark on my part. In attempting to deal comprehensively with questions so numerous and interests so various as those to which the present Code will be applicable, no Government can flatter itself that it has not made any important omissions, and we do not suppose that the law we hope to pass to-day may not be susceptible of improvement by future amendments.

"The framing of such a Code as this requires more than the science of the lawyer—more than the skill of the draftsman. It demands also that intimate knowledge of local peculiarities of prac-



ties and custom, and that familiarity with the practical working of existing laws, which are specially possessed by the European and Native Judges in the Mufassal, and by the executive officers of the Local Governments. From all these, prolonged assistance has been received, and to all these our final thanks are due.

“It may indeed be said that the whole legislative and administrative machinery of India has, for a lengthened period, been at work upon the Bill before us, and my trust is that the Council will now concur in ratifying the result of so much labour, thought, and knowledge.”

The Motion was put and agreed to.

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## SOURCES OF HINDU LAW.

(COMMUNICATED.)

ACCORDING to the belief of the Hindus, their laws, both religious and municipal, are equally founded upon revelation and inspiration. They consist of two portions of which one preserved in the very words of revelation is called *Sruti*, and the other recorded by persons under inspiration who commemorated revelation is designated *Smriti*. The former means audition, while the latter signifies recollection. The one is contra-distinguished from the other.

The *Sruti* is the revealed or traditional law, and is held in the highest estimation by the Hindus to be their Holy Script. It is their supreme religious authority to which appeal is made on solemn occasions, and forms the ground-work of all religious institutions. It constitutes the four Vedas, Sama, Rig, Yajur and Atharva which principally treat of religion, but rarely deal with topics of purely legal nature.

The *Smriti* is the remembered law, and recites the sense of the doctrines inculcated by the Great Deity either in His own words or some other equivalent expressions. It contains sacred precepts reduced to writing by inspired personages, and presumed to have a divine sanction.

Both the religious and the municipal laws of the Hindus are treated in the *Smriti*. The former comprises rituals and religious observances which have been classified under separate heads. The rituals, both ancient and modern, are denominated *Kalpa* or *Padhati*. The latter includes the civil and criminal regulations.

The *Smriti* is divided into three *Adhyayas* (books,) or *Kandas* (sections,) namely:—*Achara* (ritual,) *Vyavahara* (jurisprudence,) and *Prayaschitta* (expiation.)

The *Achara Adhyaya* or *Kanda* treats of ceremonies, observances and rites. It prescribes rules for the performance of religious, moral and social duties of four castes, the Brahmana, Kshatriya, Vaisya and Sudra.

The *Vyavahara Adhyaya* or *Kanda* deals with civil acts and mutual dealings of persons. It comprises rules of private acts and controversies, as well as of administrative law.

The Prayaschitta Adhyaya or Kanda lays down rules of penance for sinful acts, and dwells at length upon the retribution which is undergone by sin both in this world and the next.

The Smriti, which is otherwise known by the designation of Dharma Shashtra, comprehends the general body of religious and ceremonial observances, of moral duties, and of municipal law.

The Dharma Shashtra has been divided into three classes.—I. Smritis or Text-Books. II. Vyakhyaṇa or Commentaries. III. Nibandhana Grantha or Digests.

The Text-Books, Commentaries, and Digests are respectively the ancient, mediæval, and modern works on Hindu Law, all of which are written in the Sanscrit language. They are considered to be the original authorities on Hindu Law.

To the above mentioned three divisions of the Dharma Shashtra may be added two other classes of works on Hindu Law which are chiefly derived from them, and are now fully recognized as authorities. These are English Works on Hindu Law, and Forensic Decisions on Hindu Law. Both of them are recent and second-hand.

The authorities of Hindu Law may, therefore, be conveniently arranged under five distinct heads:—I. Text Books. II. Commentaries. III. Digests. IV. English Works on Hindu Law. V. Forensic Decisions on Hindu Law.

The Text-Books of Hindu Law are the original Smritis written or said to have been composed by holy sages of antiquity. They are not now regarded as conclusive but corroborative authorities.

The Commentaries on the Text-Books are deemed as authorities next to the texts commented upon as far as their interpretation goes. The glosses which merely explain the text are considered to be of no final authority at the present day. But the commentaries which generally expound the law are respected as final authorities.

The Digests comprise the entire system of law or a portion of the same compiled from the Text-Books and their Commentaries with necessary comments. They are the leading authorities on Hindu Law.

Many Commentaries on, and several Digests of, the Text-Books originated with the rise of different dynasties in India, and declined with their decline. These works once gave the law of the territories governed by the dynasties.

The English Works on Hindu Law have been composed or compiled by European and Native writers. They profess to treat in a somewhat systematic form the Law as laid down in the original Hindu Law Books of ordinary use. They are looked upon in the light of authorities, and have already secured a place in the Library of the Indian Lawyer.

Forensic Decisions on Hindu Law are judgments passed by Court of Law in cases involving different points of the law. Their number is daily increasing. In point of practical utility Forensic Decisions are now-a-days held by judicial functionaries and legal practitioners as the first class of the authorities on Hindu Law. Judicial rulings are in fact the illustrations of the principles of law.

### I.—TEXT BOOKS.

In the beginning of the creation the Supreme Being taught laws to Swayambhuva Menu who himself recollected and instructed them to ten sacred sages, Marichi, Atri, Angiras, Pulastya, Pulaha, Kratu, Pracheta, Vasishta, Bhrigu and Narada. These holy personages are reverentially styled lords of created beings. For the promulgation of the said laws Menu appointed his son Bhrigu who on his part communicated them to all the Rishis.

After the plan of the supreme legislative assembly presided over by the venerable sage Bhrigu who rehearsed the Laws of Menu, several other legislative councils were established in course of time in different parts of India, and headed by pre-eminent saints selected by the said assemblies.

In the absence of authoritative annals of Hindu legislation it is very difficult to trace accurately the precise localities and exact periods of the holding of several legislative assemblies, or ascertain their respective presidents and proceedings.

The Hindu legislators have been grouped under two classes:—Ancient or Primitive, and Modern.

Ancient lawgivers were holy sages of the Brahminical class who assumed legislative authority. The peculiar traits which were possessed by them for the qualification of their eligibility to the office of legislators were their abstinence from worldly desires and sensual gratification, absolute self-denial, profound devotion to religious and other laudable pursuits, free association with other classes, and ability of understanding the feelings and notions of

the people for whom they legislated. They performed to the best of their belief the task of legislation, and enacted such laws as were deemed requisite for the regulation and well-being of the community.

Modern legislators who were also of the sacerdotal tribe were for the most part competent and talented ministers or officers attached to the courts of the modern Hindu sovereigns, whose sovereignty ceased of late, for the purpose of regulating the laws of their territories. Their legislation was mainly confined to the expression of their opinions on such portions of the ancient legislative enactments as were best suited to meet the wants of their days. They were the mouthpiece of their employers and did what they had been directed to do. These lawgivers are the real authors of several Digests of which some have taken their titles from the writers' patrons.

The objection taken by some writers to the legislation of the Hindu legislators not being uniform among the different castes is untenable; for uniformity of legislation can never be expected even from the legislature of an enlightened nation composed of persons of diverse manners and customs.

The number of the ancient Hindu lawgivers varies according to the different lists of different writers, and is even rendered uncertain by the redactions of the names of some legislators. The redactions are Vriddha, Vrihat, Madhyama and Laghu.

The following is an alphabetical list of the primitive Hindu legislators with redactions, which has been prepared from the various lists given by several Native as well as European writers.

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| 1. Agni.   | 9. Bhrigu.      |
| 2. Angiras (three redactions :<br>A., Madhyama A., and<br>Vrihat A.) | 10. Boudhayana. |
| 3. Apastamba.  | 11. Buddha.     |
| 4. Ashwalayana.  | 12. Chhāgaleya. |
| 5. Atreya.   | 13. Chyavana.   |
| 6. Atri.   | 14. Cidambara.  |
| 7. Bhaguri.  | 15. Daksha.     |
| 8. Bharadwaja.   | 16. Datta.      |
|  | 17. Devala.     |
|  | 18. Dhroumya.   |

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| 19. Gargya.   | 45. Rishiringa.  |
| 20. Goutama (two redactions : G., and Vriddha G.)             | 46. Samvarta (two redactions : S., and Vrihat S.)                  |
| 21. Harita (three redactions : H., Vriddha H., and Vrihat H.) | 47. Sandilya.  |
| 22. Jabali.   | 48. Sankha.  |
| 23. Jatukarana.   | 49. Santanu.   |
| 24. Kanva.  | 50. Satatapa (three redactions : S., Vriddha S., and Vrihat S.)    |
| 25. Kapila.   | 51. Satayana.  |
| 26. Kashyapa.   | 52. Satyavrata.  |
| 27. Katyayana (two redactions : K., and Vriddha K.)           | 53. Saunaka.   |
| 28. Krishnajini.  | 54. Soma.  |
| 29. Kuthumi.  | 55. Sumantu.   |
| 30. Likhita.  | 56. Ushana.  |
| 31. Lohita.   | 57. Vasishta (three redactions : V., Vriddha V., and Vrihat V.)    |
| 32. Lokakshi.   | 58. Vatsa.   |
| 33. Marichi.  | 59. Vishnu (three redactions : V., Vriddha V., and Vrihat V.)      |
| 34. Markandeya.   | 60. Vishwamitra.   |
| 35. Menu (three reductions : M., Vriddha M., and Vrihat M.)   | 61. Vrihaspati (two redactions : V., and Vrihat V.)                |
| 36. Naciketu.   | 62. Vyaghra.   |
| 37. Narada.   | 63. Vyasa (two redactions : V., and Vrihat V.)                     |
| 38. Parásara.   | 64. Wamun.   |
| 39. Paraskara.  | 65. Yajnavalkya (three redactions : Y., Vriddha Y., and Vrihat Y.) |
| 40. Pitámaha.   | 66. Yama (two redactions : Y., and Vrihat Y.)                      |
| 41. Poifhinashi.  |  |
| 42. Pracheta (two redactions : P., and Vrihat P.)             |  |
| 43. Prajapati.  |  |
| 44. Pulastya (two redactions : P., and Laghu P.)              |  |

The Puranas, which treat of heroic history and mythology, are the only available sources through which the birth and actions of the ancient Hindu legislators may be very faintly known.

The ancient Hindu Law is chiefly to be found in the collections technically termed Sanhitas or institutes, of which the authorship

has been ascribed to the abovementioned sacred sages. The authenticity of these works is implicitly acknowledged by the Hindus.

It is the opinion of the best glossators that the Sanhitas bearing the names of the aforesaid saints have been probably recorded from their verbal instructions by their disciples. The mode in which the institutes are written corroborates in a great degree the assertion of the commentators. Instance the Achara Kandas of the Sanhitas of Yajnavalkya and Parasara who are even named in their own lists of legislators given therein.

• The institutes of Menu, Atri, Vishnu, Harita, Yajnavalkya, Ushana, Angiras, Yama, Apastamba, Samvarta, Katyayana, Vrihaspati, Parasara, Vyasa, Sankha, Likhita, Daksha, Goutama, Satatapa and Vasishta are considered by some writers to be of superior authority, and termed Smriti, while the Sanhitas of other lawgivers are deemed to be of inferior authority, and designated Upasmriti. This distinction is nowhere maintained in practice. Both the classes are equally imperfect at the present day.

Parasara ordains in his Sanhita that the Ordinances of Menu, Goutama, Sankha and Likhita as well as of his (Parasara's) own are respectively appropriate to the Krita or Satya (first,) the Treta (second,) the Dwapara (third,) and the Kali (fourth or present) Yuga or age. It does not at all appear that this distinction has been really or practically observed in any age. All and every one of the ancient lawgivers are equally venerated next to Menu in point of authority.

The Institutes of Parasara which, if it be conceded, were specially composed for this age and intended to be applicable to it, could not but be highly appreciated by the legal public, were not the Vyavahara branch of his Smriti wanting.

Many treatises are attributed to the same sage. They are called his greater (Vrihat) or less (Laghu) Sanhita, or a later work of the writer, when old (Vridhha).

Generally speaking, the Sanhitas of the ancient Hindu legislators are not of considerable bulk. They are for the most part devoted to religious ceremonies and daily observances, but incidentally treat of legal topics.

The complete works of all the venerable sages with the exception of Menu have not been duly preserved from the ravages of time. But fragments of their writings which escaped from the

depredations of time have come down to the present generation.

The extant Text-Books of the holy sages other than that of Menu do not treat of all kinds of subjects. They are confined to the discussion of such topics as are connected with the Smriti only, and differ from the work of Menu in a few instances both in the nature of doctrine and form.

The Smritis which are no longer extant, are occasionally alluded to or cited by many writers of the Digests.

The exact periods of the composition of the Text Books are not easily ascertainable owing to the absence of genuine Indian chronology. But historical and positive proofs are the only criteria for the correct determination of the age of the Sanhitas.

Menu is described in his Sanhita to have sprung from the Self-Existent Being, and is, therefore, known Swayambhuva. He was the grandson of Brahma, and the first progenitor of the human race. Swayambhuva Menu was the primeval and supreme lawgiver of the Hindus. He flourished in the beginning of the world. From him originally descended six personages styled six Menus who were followed by seven more of the same designation who ruled the mundane regions. The place as well as the length of time he lived are not at all known.

The Sanhita of Menu denominated Manava Dharma Shastra is the most ancient of the written laws of the Hindus. It is held in all ages with profound veneration after the Vedas in holiness, and forms the basis of the Dharma Shastras of the other legislators. They follow Menu in model, and cite him as their undeniable authority. The Ordinances of Menu were regarded by them with so much reverence that no portion of their own institutes which is incongruous to his was to be respected.

The Manava Dharma Shastra treats of all kinds of topics connected more or less with the Dharma Shastra. It dwells upon cosmogony, metaphysics, ethics, rituals, expiation, jurisprudence, politics, commerce, military affairs, metempsychosis, future world as well as other curious and interesting matters.

The Laws of Brahma are said to have been reproduced by Menu in one hundred thousand couplets classified under twenty-four heads in one thousand chapters. This reproduction was made over to Narada who abridged it in twelve thousand verses, and delivered



the abridgment to Sumati, son of Bhrigu. Narada's epitome was again abridged by Sumati in four thousand couplets. The extant Manava Dharma Shastra which consists of two thousand six hundred and eighty-five verses in twelve chapters is a portion of Sumati's epitome, and is termed the Laghu Menu Sanhita or the less institutes of Menu.

The Code of Menu is entirely wanting in method and arrangement. The disarrangement is more the result of accident than that of design.

The Institutes of Menu are now viewed as a work of veneration except in the Presidency of Bombay where they are implicitly followed.

The antiquity of the Manava Dharma Shastra has been acknowledged everywhere. But the precise date of its composition is not correctly given by any scholar, whether European or Indian.

The estimate formed of the age of Menu's Code by Messrs. Chezy, Deslongchamps, Elphinstone, Jones, Schlegel and Wilson varies from the thirteenth to the fourth century before the birth of Christ. The date of the promulgation of the Laws of Menu, must, however, be considered to be coeval with that of the world on the authority of the Manava Dharma Shastra, if believed.

Irrespective of the blemishes of the Institutes of Menu, the work is distinguished for its very great antiquity, celebrity and classic beauty, and has undergone several editions and versions from many oriental scholars.

In 1813 the Sanscrit Text of the Menu Sanhita with Kulluka Bhatta's gloss which will be hereafter noticed under the head of Commentaries was published in the Devanagiri character at Calcutta.

Mr. (afterwards Sir) Graves Chamney Haughton, Professor of Hindu Literature in the East India College, edited the original Text of the Manava Dharma Shastra which was printed at London in 1825.

The Laws of Menu in Sanscrit were edited by the French scholar Monsieur Loiseleur Deslongchamps, and published in Paris in 1830.

In 1833 an edition of the original Institutes of Menu appeared in Bengali type in Calcutta.

The first three books of the Sanscrit Code of Menu by an anonymous writer, (whose name as learnt from a reliable source

is Tarachand Chakravarti) were printed in the Devanagri and Bengali characters at Calcutta. A literal Bengali translation of the said books is given with a few notes in Bengali appended thereto. The work made its appearance in 1833.

The original Text of Menu, together with the commentary of Kulluka Bhatta, in Bengali type, followed by a Bengali version, was published in Calcutta.

The earliest English translation of the Sanscrit Text of the Manava Dharma Shastra appeared from the pen of Sir William Jones, the most distinguished linguist, and the Chief Justice of the late Supreme Court of Bengal. The version is preceded by a learned preface, and is generally regarded the masterpiece of the learned translator. "It is" says Mr. Burnell, "far from exact, and is elegant rather than critical." Dr. Goldstucker seems to be of the same opinion.

The translation of the Institutes of Menu by Sir William Jones was first published in Calcutta in 1794, and again in 1796. It is also incorporated in his works published by Lord Teignmouth.

A revised edition of Sir William Jones' version of the Manava Dharma Shastra, with elucidatory notes, by Mr. G. C. Haughton was printed at London in 1825.

In 1833 Sir William Jones' translation of the first three books of Menu's Ordinances, accompanied by a revised English version of the same, with foot notes in English added for the justification of the divergence, appeared in the edition of the Menu Sanbita by Baboo Tarachand Chakravarti. The accuracy of the revised translation is far from being questioned by Dr. Goldstucker who considers the translator to be a very competent scholar.

The third edition of Sir William Jones' version of the Manava Dharma Shastra by the Reverend P. Percival was published in Madras.

Mr. Standish Grove Grady, Reader on Hindu, Mahomedan and Indian Law to the Inns of Court edited Sir William Jones' translation of the Laws of Menu as compared and revised by Mr. G. C. Haughton. A preface and a copious index are respectively given at the outset and close of the work. This edition was issued at London in 1869.

Mr. D. Richardson translated into English from the Burmese dialect the Institutes of Menu under the title of Damathal.

The Code of Menu was rendered from the original into the German language by Mr. Huttner in 1797.

Monsieur Loiseleur Deslongchamps presented to the European world a French translation of the Laws of Menu. The version was published in Paris in 1833.

The English translations of the several texts of Menu, occurring in the various Digests of Hindu Law, by different scholars of Europe and India, are at variance with those by Sir William Jones. Instances of this conflict have been partially noticed by Dr. Goldstucker.

Yajnavalkya is described in the Introduction to his Sanhita as the grandson of Vishwamitra, and is said to have delivered *extempore* his precepts to an audience of Munis at Mithila.

Next in point of importance to the Manava Dharma Shashtra is the Sanhita of Yajnavalkya. It treats of Ritual, Law, and Expiation in one thousand and twenty-three couplets, and excels the Institutes of Menu in conciseness of arrangement.

The Text of Yajnavalkya with its well-known commentary entitled Mitacshara, which is to be noticed under the head of Commentaries, is the nearly universal authority in India.

The age of Yajnavalkya's Code has not been definitely determined. But its earliest date is conjectured to be the middle of the first century after Christ.

In the years 1812 and 1820 the original Text of Yajnavalkya, with its gloss Mitacshara, was respectively published in the Devanagari character at Calcutta.

The Sanhita of Yajnavalkya appeared in the Devanagari character in Calcutta during the years 1840 to 1845.

Sri Bhavani Charana Vandyapadhyaya edited the Sanscrit Text of Yajnavalkya, and published the same in Bengali type at Calcutta.

Dr. A. F. Stenzler of Breslau is the editor of an edition of the Smṛiti of Yajnavalkya. The work contains marginal notes showing the similar passages of the Institutes of Menu. This mode of arrangement is extremely useful to the reader in the comparison of the doctrines propounded by the two great lawgivers. A German

translation of the original Code is also given in this edition. The book was printed at Berlin in the year 1849.

A select portion of the Achara Kanda as well as the entire Vyavahara Kanda of the Dharma Shastra of Yajnavalkya were translated from Sanscrit into English by Dr. Edward Roer, and Mr. William Austin Montriou of the Calcutta Bar. Under the title of Hindu Law and Judicature the translation was published in Calcutta in 1859. It abounds with many useful and learned annotations. A preface, an interesting introduction, and an index are all to be found in their proper places.

The English version of Yajnavalkya's text cited in the several Digests of Hindn Law translated by the oriental scholars is not only conflicting, but also inconsistent with what has been rendered by Messrs. Roer and Montriou.

Angiras, one of the ten lords of created beings, was according to the Bhagavata the father of Utathya and Vrihaspati, and flourished during the reign of the second Menu. He composed a concise tract consisting of seventy verses.

Apastamba wrote a treatise in prose as well as a metrical epitome of the same. He is also the author of Sutra named after him.

Ashwalayana is said to have written a work on religious acts and ceremonial observances. He is also known for his treatise on Sutra which generally treats of Fire-sacrifice in worship of deities, and performance of purifying ceremonies.

Atri holds a place among the ten lords of created beings. He was the father of Datta *alias* Dattatreya, Durvasa, and Soma, and wrote a metrical tract which is distinguished for perspicuity. His work is an epitome of the Manava Dharma Shastra. It is very ancient and generally known.

The Sanscrit Text of Atri has been edited by Sri Bhavani Charana Vandyopadhyaya, and printed in the Bengali character at Calcutta.

Bhrigu was one of the ten lords of created beings. He was the promulgator of Menu's Ordinances, and one of his sons known by the epithet 'son Brahma.' A Text-Book is attributed to him.

There were two sages who bore the name of Daksha: one was son of Brahma known by the name of Prachita and occupied a place among the ten lords of created beings, while the other was

grandson of Prachina Varahisha. It seems, therefore, extremely doubtful which of them was the lawgiver. The authorship of a metrical tract on law is, however ascribed to Daksha.

Agreably to one legend Devala was son of Vishwamitra and grand sire of the distinguished grammarian Panini ; but according to another he was the great-grandson of Daksha. He is the author of a Sanhita.

Gargya was the son of the well-known astronomer Gargya. He is said to have composed a Text-Book.

Goutama, son of Gotama, who founded a rational system of logic and metaphysics, wrote an excellent treatise on law. Although his name is mentioned in every list of lawgivers, texts are often quoted in his father's name. The Sanhita attributed to Goutama is more developed than the institutes of any other venerable sage.

Harita wrote a treatise in prose. A metrical epitome of his work is also extant.

Kashyapa, son of Marichi, is the writer of a Sanhita.

Katyayana composed a law tract which is not only complete, but also lucid.

Likhita, brother of Sankha, is the author of a metrical treatise. Both the brothers conjointly composed a treatise in prose which has also been epitomized in metre.

Marichi was one of the ten lords of created beings, and father of Kashyapa. A Sanhita is ascribed to him.

Narada occupies a place among the ten lords of created beings. He was begotten by Brahma and again by Kashyapa on Daksha's wife. He was the sage among gods, and composed a Sanhita of which a portion is extant.

Parasara, grandson of Vasishta, wrote a treatise consisting of the Achara and the Prayaschitta Kandas in five hundred verses.

The original Sanhita of Parasara has undergone an edition from the pen of Sri Bhavani Charana Vandyopadhyaya. It has been printed in Bengali type at Calcutta.

Praehita, son of Prachina Varahisha by a daughter of the Ocean, is said to have written on the Dharma Shashtra.

Pulastya, ranked among the ten lords of created beings, was the father of Agastya. He composed a Text-Book.

Of the Sanhita of Samvarta an epitome in verse is available.

Sankha, brother of Likhita, is the author of a metrical treatise written in eighteen chapters. The joint composition of the two brothers and their separate works are considered as one work. Sri Bhavani Charana Vandyopadhyaya published in the Bengali character an edition of the original Sanhita of Sankha in Calcutta.

Satatapa wrote a tract on expiation and penance of which a metrical epitome is extant.

Ushana *alias* Shukra, grandson of Bhrigu, is the regent of the planet Venus. His metrical institutes and an epitome of the same are both extant.

Vasishta, one of the ten lords of created beings, and preceptor of the inferior gods, is the author of an excellent treatise in prose and verse.

Visanu was an ancient sacred sage who must not be confounded with the Indian Divinity Vishnu. He is the reputed writer of an elegant metrical work on law of which an epitome is also extant. The Institutes of Vishnu entitled Bhagavat Vishnu Sanhita contain one hundred chapters.

The original text of Vishnu has been edited and published by Sri Bhavani Charana Vandyapadhyaya in Bengali type at Calcutta.

Vishwamitra, grandfather of the illustrious Yajnavalkya, was originally of the Kshatriya caste. He was a sage of the military class, and subsequently became a Brahmana on account of his profound devotion. He is mentioned as the author of a Sanhita.

Vrihaspati was according to one legend son of Angiras, but according to another son of Devala. He is the regent of the planet Jupiter. He wrote a code of which an epitome is extant.

Vyasa, son of Parasara, and the reputed author of the Puranas, composed some legal treatises.

Wamun, a Brahmana Rishi of Hindustan, wrote a tract on Achara, Vyavahara and Prayaschitta.

Yama, brother of the seventh Menu, and governor of the world below, is the author of a concise treatise in one hundred couplets.

In 1845 the original Texts of the holy sages Angiras, Apastamba, Atri, Daksha, Goutama, Harita, Katyayana, Likhita, Parasara, Samvarta, Sankha, Satatapa, Ushana, Vasishta, Vishnu, Vrihaspati, Vyasa, Yajnavalkya and Yama were printed in the Devanagari character at Calcutta.

According to the Bengal jurist Pandit Bhavasankara Vidyaratna the Institutes of the thirty seven legislators, Angiras, Apastamba, Atri, Bhrigu, Boudhayana, Daksha, Devala, Gargya, Goutama, Harita, Jabali, Kashyapa, Katyayana, Kuthumi, Likhita, Lokakshi, Marichi, Menu, Narada, Parasara, Paraskara, Poithinashi, Prachita, Pulastya, Rishiringa, Samvarta, Sankha, Satatapa, Sumantu, Ushana, Vasishta, Vishnu, Vishwamitra, Vrihaspati, Vyasa, Yajnavalkya and Yama are all compiled in the collection termed Shattrinshun Mathung.

The Dharma Shastra of the five lawgivers Chhagaleya, Chyavana, Jatukarana, Pitamaha and Prajapati are considered by Professor Stenzler to be extant from his having personally met with citations from all of them.

Besides the abovementioned Sanhitas there are some texts, if not, the entire institutes, of the remaining legislators with the exception of a very few. The fragmentary texts are occasionally quoted in the Glosses and Digests of Hindu Law.

Except the English translations of the Manava Dharma Shashtra and the Institutes of Yajnavalkya, which have been previously noticed in their respective places, no regular version of the text of the Smritis of any other sacred sages has yet been rendered in English. But the detached rendering of a few texts of one or the other of these lawgivers cited in such Commentaries and Digests as have been translated into English only is noticeable. Disagreement in the several versions of the same text of any of the aforesaid Rishis is even observable, and has been partly pointed out by Dr. Goldstucker.

The Sanhitas of the ancient lawgivers have been recognized to be the independent authorities and sources of Hindu Law.

The precepts of the Smritis have, however, been interfered with by usage, and their language has been rendered obscure by time. For the true exposition of the law laid down in the several Sanhitas recourse must be had to the various Commentaries and Digests which are now looked upon as the repositories of Hindu Law. The lastmentioned works are more specially referred to for the determination of the disputed points of the law.

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THE  
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INSTANCES OF THE INTREPIDITY OF THE BAR.

MR. ERSKINE, in the Dean of St. Asaph's case, exhibited the proud spirit of an English Counsel, who knows that in the defence of his client, he is justified in using every degree of freedom which does not infringe on the respect due to the Court. Mr. Justice Buller, after the jury had, through their foreman, stated their verdict, declared, that its effects, as expressed, would be different from the obvious intention of the jury; Mr. Erskine, however, insisted that the verdict should be recorded as it was stated by the foreman.

*Buller.* Let me understand the jury.

*Erskine.* The jury do understand their verdict.

*Buller.* Sir, I will not be interrupted.

*Erskine.* I stand here as an advocate for a fellow-citizen, and I desire that the verdict may be recorded as given by the jury.

*Buller.* Sit down, sir, remember your duty, or I shall be obliged to proceed in another manner.

*Erskine.* Your lordship may proceed in what manner you may think fit; I know my duty as well as your lordship knows yours. *I shall not alter my conduct.*

In arguing the famous Wababee case, Mr. Ingram for the prisoner said:—"Now my Lord, in the case of Ameer Khan, two questions arise, with only one of which I have to deal. (1) Is the Government, as is claimed on its behalf, possessed of immeasurable power? (2) Is it acting wisely in using that power? I have nothing to say to the second question. I will leave that to the gentlemen of the fourth estate and to public opinion. The sole question which I have to argue is this. Has the Governor-General immeasurable power in India or not? Is Lord Mayo the constitutional servant of a limited monarch, or is he an absolute autocrat in India? That is the question which I have to bring before your Lordship, and which your Lordship has to determine; and in considering that question, my Lord, I shall not appeal to those feel-



ings which I know you possess, your humanity and mercy—nor shall I frighten you by drawing a picture of civil war, but I shall treat you as an English Judge ought to be treated, and as “Justice is blind” I trust your Lordship will decide this case without a single question as to the possible consequences that might ensue. I desire my Lord, before I commence my reply, to state, that if I should occasionally make use of the names of the two gentlemen, the law-officers of the Crown, I shall mean nothing personal. The Advocate General commenced his speech in this case by making a kind of appeal to us, as to the danger of attributing any malicious motives to the Lieutenant-Governor and to the Governor-General of India, and said there was a particular danger in such a community as this, lest thereby the Government might be brought into odium. But I maintain that, if the Government are brought into contempt, it is the fault of the Government alone. My Lord, I shall speak as fearlessly as an English Counsel should speak, and if in the conduct of this case my sympathy and indignation are excited, I shall freely give vent to them. I shall not speak of the myrmidons who carried out this arrest; but I shall hold the Governor-General of India and the Lieutenant-Governor responsible for this folly and crime—a crime which was conceived by Sir William Grey, and continued and confirmed by the Governor-General of India. The Advocate General, upon the first day, made the most extraordinary statement, which I ever heard in a Court of Justice. He denied that any Municipal Court could entertain this application. I attributed that statement to the surprise of an unready man, and thought the expression fell from him in an unguarded moment; but his repetition of that statement wears a very different aspect. It means that the Governor-General of India, claims to be above all law. Before he could make a claim of that kind on behalf of any authority, what a change must have taken place in the Advocate General? He must have ceased to be a lawyer, and become a simple official—he must have surrendered his independence, and become an humble servant of the Crown.”

*The Advocate General.*—I protest against these personal remarks for the honor and dignity of this court.

*Mr. Justice Norman.*—Mr. Ingram, you have already used two or three expressions which are not altogether proper, especially with regard to Sir William Grey and Lord Mayo—You must remember the latter is the Viceroy of India, and, as such, is entitled to some degree of respect.

*Mr. Ingram.*—In deference to your Lordship I will give up what

I claim to be the just right of counsel in asserting the liberty of his client.

*Mr. Justice Norman.*—God forbid that I should stop the mouth of any Counsel. At the same time it is my duty to remind you, that in making any observations, you should avoid, as far as you possibly can, any thing like personality. Courtesy to your brethren of the bar demands it.

*The Advocate General.*—It matters not one farthing, as far as I am concerned, what the Counsel may say. I merely ask your Lordship to support the dignity of this Court.

*Mr. Ingram.*—I thought I had drawn a wise distinction between the officer and the man. The opposite side threw down a gage of battle to us, and they know perfectly well that the race which we Counsel have to run is a race in which the goal cannot be reached without some little dust. If there are gentlemen so thin-skinned, as to dread the slight wounds and scratches received in the combats of the forum, I would advise them to retire, and to leave the arena to men.

Mr. Curran, than whom a more intrepid advocate never existed, was one day exerting himself with more than ordinary zeal in the cause of a client, when the presiding judge called out to the sheriff to take into custody any one who should venture to disturb the decorum of his Court. "Do, Mr. Sheriff," exclaimed Curran, unawed, "go and get ready my dungeon; prepare a bed of straw for me; and upon that bed I shall to-night repose with more tranquillity than I could enjoy were I sitting on that bench with a consciousness that I *disgraced it.*"

But bold and intrepid conduct sometimes leads to illegal conviction and punishment.

The following is an instance :—

## THE CALCUTTA HIGH COURT.

*The 14th May, 1877.*

### PRESENT :

The Hon'ble Sir R. Garth, Kt., Chief Justice, and Mr. Justice Markby and Mr. Justice Prinsep.

IN THE MATTER OF TARAK NATH PALIT, BARRISTER-AT-LAW.

Messrs. Branson and Egerton Allen, instructed by Messrs. Ghose and Bose, for Mr. Palit.

The Hon'ble H. Bell, Legal Remembrancer, for the Magistrate of Howrah.

In this case Messrs. Markby and Prinsep, Justices, on the application of Mr. Branson, had made an order under Section 297 of the Code of Criminal Procedure, calling up the records from the Court of the Magistrate of Howrah, who had convicted Mr. Palit of contempt of Court, and fined him Rs. 100.

The following was the judgment complained of:—

At the commencement of the proceedings in this case, the Accountant was called on to take a solemn affirmation, and the Court proceeded to read the papers connected with the case. Mr. Palit, who appeared on behalf of Durga Prosad Chattarji, the defendant, addressed the Court enquiring whether the witness was supposed to be giving his evidence. The Court, being otherwise engaged, declined to answer the question, and on its being repeated several times, requested Mr. Palit to be silent. Mr. Palit refused to be silent, upon which the Court, after endeavouring in vain to induce him to obey its orders, warned Mr. Palit that it would assert its authority. Mr. Palit still continued to address the Court, on which the Court recorded this statement. Mr. Palit, being called on to make a statement, states as follows:—That the statement recorded above is incorrect. The facts are these. After the witness had been affirmed, there was some conversation going on between the Magistrate and the witness, and the witness was referring to a book. Upon this Mr. Palit got up to ask the Court if the witness was giving evidence. The Magistrate replied he was not bound to give the information. Mr. Palit thereupon observed that, appearing as he did on behalf of the prisoner, he had an undoubted right to be informed as to whether the witness was giving evidence or not; which observation was again met by the Court with the remark that the Court was not bound to give the information. Mr. Palit again said that he was entitled to get the information, whereupon the Magistrate told him to be silent. The tone of the Magistrate appeared to Mr. Palit to be offensive. Mr. Palit remonstrated, and said that he had an undoubted right to conduct the case, and that if he were treated like that, he must retire from the Court, whereupon the Magistrate said: "You had better be off; you have no *locus standi*;" whereupon Mr. Palit said, if he went away his client would go unrepresented, and the case could not go on. To which the Magistrate replied that he would proceed with the case in his absence, thereupon Mr. Palit began to make some observations, and the Magistrate again told him to be quiet. The Magistrate also added: "If you won't be quiet, I shall fine you Rs 100." Mr. Palit observed

that he had no right to fine him under the circumstances, and the Magistrate again told him that he would fine him another Rs. 100. As far as Mr. Palit now remembered, he believed he was fined altogether Rs. 100. Whilst this was going on, Mr. Palit stooped down to speak to some of the pleaders engaged in the case, asking them to take accurate notes of what was taking place in Court. The Magistrate interfered, and told him that he had already asked him to be quiet, and if he went on speaking he would fine him again. Mr. Palit observed that he certainly had a right to speak to his own juniors in the case. Mr. Palit may here observe that he was carrying on that conversation in whispers. The Magistrate said that if he wanted to carry on a conversation with his juniors, he must do so out of Court, upon which Mr. Palit was going to make some observation, when he was fined by the Magistrate for the first time. As regards the question whether Mr. Palit ought or ought not to apologise, he considers that he has not done anything, intentionally or otherwise, which is in the least degree disrespectful to the Court; at the same time, he disclaims any intention to be otherwise than thoroughly respectful to the Court. If, however, his conduct has been open to misconstruction, he is very sorry for it; at the same time, in the discharge of his duty as Counsel for his defendant, he feels himself bound to say what he did. The Court then asked Mr. Palit whether he would formally apologise for refusing to be silent when the Court asked him to be silent. Mr. Palit stated that he was not aware that he had refused to be silent, excepting by pursuing the conduct set forth above. If, however, such conduct has been construed into a refusal by the Court, Mr. Palit is sorry for it.

The Court having recorded the above statement and read it to Mr. Palit, asked whether he had any objection to make to the record, to which he replied that he had none.

The statement made by Mr. Palit, after having heard read to him the statement made by the Court, has been carefully considered by the Court. The Court has to record the following observations:—

1. That the question first asked by Mr. Palit was in the words given by the Court and not in those given by Mr. Palit, and that the one was disrespectful and contemptuous, especially in the use of the word "supposed."

2. The Magistrate did not speak offensively to Mr. Palit when first ordering him to be silent.

3. That the Magistrate did not use the words "you had better be off."

4. That the words "you have no *locus standi*" are not quite correct, and did not occur as stated. After the Court had threatened to fine Mr. Palit unless he were silent, Mr. Palit said : "Fine *me* ? You cannot fine me"—upon which the Court, supposing Mr. Palit to disclaim any subjection to the authority of the Court, said : "Then you can have no *locus standi* here."

5. The words "under the circumstances" were not used by Mr. Palit. The words used were "you have no right to fine me" and "you cannot fine me", as stated above.

6. Mr. Palit was not talking to the pleaders in a whisper but in a very loud tone, almost as loud as he had been using when talking to the Court, so that the talking formed a direct continuance of the disobedience to the Court's order to be silent. Subject to these objections, the Court admits Mr. Palit's statement, though it omits very much of what he (Mr. Palit) said to be not an altogether incorrect statement of what had occurred. The Court certainly refused to answer Mr. Palit's question, and stated that it was not bound to do so. When Mr. Palit persisted in demanding an answer to the question, the Court requested him to be silent ; when Mr. Palit refused to be silent, the Court merely repeated the order ; at length the Court threatened to fine him unless Mr. Palit were silent ; when Mr. Palit denied that the Court could fine him, the Court then said that he had better leave the Court, Mr. Palit still persisting in addressing the Court. The Court at length did verbally order him to be fined Rs. 100, and on Mr. Palit still persisting in the same course, the order was verbally repeated. At length, but not until the Court commenced to record proceedings, Mr. Palit became silent. It is an extremely disagreeable duty to this Court to have to punish a person who appears before it as Counsel in a case, and the Court endeavoured to induce Mr. Palit to apologise frankly for his repeated and undoubted refusal to be silent ; but these efforts failed. The Court feels that its reasonable order has been openly, persistently, and repeatedly set aside and contemptuously rejected by Mr. Palit, and in vindication of its authority fines Mr. Palit Rs. 100.

P. S.—It seems necessary, as this case will probably be brought before a higher Court and I may have no opportunity of explaining anything which may be doubtful, to add a few words to the record written yesterday.

From Mr. Palit's explanation, it might seem that the Court had

been privately taking evidence from the witness, and that it was something of this kind, which elicited his question : " Is this witness supposed to be giving evidence ? " This was not the case. The Court was diligently reading a bundle of papers, and had only spoken once to the witness, to ask quite loudly and openly whether he had brought his books. These were the only words the Court had used to the witness, and they had occurred some seconds, probably more than a minute, before Mr. Palit spoke. Secondly, it is necessary to explain that the Court's objection was that it was not bound to answer that question. If the question had been a civil one or civilly put, the Court would have replied. Thirdly, it seems necessary in justice to Mr. Palit to explain that he himself during the proceedings subsequently complained of two sources of irritation which had occurred before the circumstances to which this case relates, and which to a certain extent may be held to palliate the abrupt discourtesy of his question, and his subsequently persisting in demanding an answer to it and refusal to be silent when ordered. One was that he had been kept a long time waiting ; the other was that the Court on entering acknowledged his salute by a very insufficient nod. It is a fact that the proceedings, from press of other work, did not commence till near two o'clock, and when the Magistrate entered and sat on his seat he did not notice Mr. Palit at all, having never before seen him. Probably, seeing some one bow, the Magistrate, mechanically and in accordance with habit, made some sort of acknowledgment. But the Court acknowledges that it does not recollect returning Mr. Palit's salute adequately, or as it would have done had it been acquainted with Mr. Palit. These circumstances were considered by the Court in passing orders in the case. (Sd.) F. H. PELLEW, Magistrate.

This will be put with the record. (Sd.) F. H. PELLEW, Magistrate.

On the case being called on, the learned Legal Remembrancer rose and addressed the Court as follows :—

I appear in this case on behalf of Mr. Pellew, the Magistrate of Howrah, and for the reasons which I will very briefly explain to your Lordships, it is not my intention to oppose the present application. Collisions between the Bar and the Bench are always to be deplored, because the administration of justice must necessarily suffer when either the authority of the Bench is weakened, or the independence and freedom of the Bar is impaired. In the present case, the collision between Mr. Palit and the Magistrate is the more to be deplored, because it arose out of a miserable misunderstanding, which a little more forbearance or

a little more tact on either side would in my opinion have most effectually removed. The misunderstanding arose in this way. A trial had commenced, in which Mr. Palit appeared as Counsel for the prisoner. The first witness who was called was an accountant, and he was affirmed in the usual course. The Magistrate, however, did not at once proceed to examine him, but turned to a bundle of papers, which he had before him, and while reading these papers he asked the witness if he had brought his books. This question, the Magistrate says, he asked openly and loudly, but Mr. Palit did not hear it. The Magistrate then turned again to the papers before him, and in about a minute afterwards Mr. Palit got up and said: "Is the witness supposed to be giving evidence?" The Magistrate, rightly or wrongly, thought that the tone of this remark was disrespectful and contemptuous, and he entirely misunderstood the object of the question. He had no idea that Mr. Palit was referring to the question which he had a minute before put to the witness about the book, and thinking, therefore, that the question was either an irrelevant or an impertinent one, he replied that he was not bound to give the information, meaning thereby that, as Mr. Palit could see the witness as well as he could, Mr. Palit could judge himself whether the witness was giving evidence or not. It was in this way that the misunderstanding at first arose. And I am authorised to state that the Magistrate is exceedingly sorry that he did not understand the object of Mr. Palit's question; that had he understood that Mr. Palit wanted to know what the witness had said, he should at once have informed him. Mr. Palit says, and I accept without hesitation what he says, that he never intended any disrespect; but the words used by him were certainly not happily chosen, and were open to the interpretation which the Magistrate put upon them. What then happened I will give in Mr. Palit's own words. The words bring the scene vividly before us, so that we can almost hear the intonation of Mr. Palit's voice, and see the action with which the words were accompanied. (The learned Counsel then read Mr. Palit's statement as taken down by the Magistrate.) Then there is a discrepancy between the Magistrate and Mr. Palit as to what followed. Mr. Pellew says that he then told Mr. Palit that he would fine him if he was not silent, to which Mr. Palit replied: "Fine me? You can't fine me"—thereby implying, as the Magistrate thought, that Mr. Palit, as an Advocate of the High Court, claimed to be exempt from the Magistrate's jurisdiction. And this will explain the Magistrate's next remark: "If you are not subject to my jurisdiction, you

have no *locus standi* here, and you had better leave the Court." Mr. Palit, however, still persisted in addressing the Court; and this it was that the Magistrate fined him for. I do not wish to say one word against Mr. Palit. I feel sure that he did not intentionally mean to defy the Court, and that the words used by him were used under considerable excitement; but I think that upon reflection he will see that the course which he pursued was not the course which in his calmer moments he would advise another advocate to adopt. A Magistrate must be supreme within the walls of his own Court, and when the Magistrate refused to answer Mr. Palit's question, Mr. Palit should have asked the Magistrate to have recorded the question and the refusal to answer the question. If this had been done, the Magistrate's conduct would have been open to correction by his appellate superior, and this unhappy altercation would have been avoided.

I now come to the next part of the case in which Mr. Palit has acted as any other gentleman would, I think, under similar circumstances have acted.

Assuming that Mr. Palit under the excitement of the occasion had not been respectful to the Court, I think he fully atoned for it by a suitable expression of regret. I will state this part of the case in Mr. Palit's own words.

(Mr. Bell here read that part of the Magistrate's judgment referring to the "apology.")

Mr. Pellew authorises me to say that had he understood Mr. Palit to mean, as I understand him to mean, that he was sorry if any conduct on his part had unwittingly given rise to this unfortunate altercation, he would at once have accepted the apology.

Unfortunately the Magistrate thought that Mr. Palit meant that he was sorry for the Court if it was so foolish as to put an unfavourable construction on his (Mr. Palit's) conduct. It seems to me that the construction which the Magistrate put upon these words was a construction which the words will not fairly bear, and I therefore must express my regret on the part of the Magistrate, that Mr. Palit's expressions of regret were not accepted in the spirit in which they were offered.

Such, my Lords, is this case—fortunately an isolated one; for though the learned Members of this Bar are daily practising before the Mufasal Courts, it is seldom if ever that any friction occurs between the Bench and the Bar.



This happy result I attribute to two causes, first, to the just appreciation of Mufasal Magistrates and Judges, of the learning, independence, integrity and honour which has always characterised this Bar, and secondly, to the courtesy which as a rule the Members of this Bar, and no man more conspicuously than Mr. Palit, invariably display when appearing before the Mufasal Courts. It would indeed be a public calamity if either this case or any other case was in any way to disturb the good feeling which has always existed between this Bar and the Mufasal Courts.

With these remarks, I beg to leave the case in your Lordship's hands.

Mr. Branson, in reply, said that when he moved the matter in this Court, he had hoped that some such happy conclusion as that they had arrived at would be come to.

Much had been said with regard to an apology stated to have been made by Mr. Palit to the Magistrate.

He thought it was a misuse of the term "apology" to apply it to what Mr. Palit said in the Lower Court.

Mr. Bell explained that he had particularly made use of the words "expressions of regret" to avoid misconception.

Mr. Branson was glad to hear the learned Counsel qualify the term.

(The Chief Justice observed that he did not think Mr. Branson need be afraid of using the word apology.)

Mr. Branson thought that apology would imply that offence had been intended. Mr. Palit had done what he could to explain that he never meant to give offence. It would have been wholly against the interests of his client for Mr. Palit, at the very inception of the trial in which he was appearing for the accused, to have done anything to disturb the calm temper which was so necessary to the administration of justice and the due investigation of the charges against him.

He conceived that Mr. Palit had been wholly misunderstood. Mr. Palit had endeavoured to assure the Magistrate that nothing was further from his thoughts than to insult or annoy him, and had failed to do so.

No one could more cordially appreciate the unity which existed between the Bench and the Bar than the Bar itself.

To the Bench it was perhaps not wholly a matter of indifference, but to the Bar it was of the greatest importance as tending to enable them

to discharge pleasantly their often difficult duties. He did not seek to criticise verbal statements, but he preferred to confine himself to the statement of Mr. Palit rendered in the first instance by the Magistrate, and approved of by that officer as substantially correct, the Magistrate simply adding the word "supposed." That word has apparently given offence.

On behalf of Mr. Palit, he would ask their Lordships to accept the expressions of regret tendered by the Magistrate through the Legal Remembrancer."

Mr. Palit was not anxious that the matter should go any further. He had been actuated by no vindictive feeling in placing it before their Lordships, but had done so in justice to his profession and his client. Mr. Palit had only wished that the issue should be tried in the calmer atmosphere of their Lordships' Court, without any party feeling.

In conclusion, he hoped that the relations between the Bench and the Bar would always remain as they had hitherto happily been, of the very best and kindest description.

Garth, C. J. (Markby and Prinsep, JJ., concurring.)

It is extremely satisfactory to the Court, that this matter, which promised to be somewhat unpleasant in its character, should have been thus amicably disposed of.

Mr. Pellew has acted as any gentleman placed in his position ought to have done; and the Court quite appreciates the proper feeling which has induced him to place himself in his Counsel's hands, and *to express regret through his Counsel for the mistake which has occurred.*

No doubt, the Legal Remembrancer was quite correct in saying that a slight misunderstanding, in the first instance, was the cause of the results which followed, and which the Court is now called upon to rectify.

Mr. Palit seeing or believing that the witness after he was affirmed, was in communication with the Magistrate, had a perfect right to ask, whether what the witness was saying, was supposed to be evidence in the case, because there is no rule which deserves to be better understood than this; that when a witness has once been sworn or affirmed, no communication, which he makes with reference to the subject matter of the inquiry, ought to be kept back from the accused or his counsel.

Mr. Palit, therefore, was perfectly justified in asking the question which he did; and it seems extremely probable from the account of the proceedings which we have before us, that the Magistrate at first did no

quite recognize the fact, that Mr. Palit was employed as the prisoner's Counsel.

It is possible that some mistake of this kind may have induced the Magistrate to refuse to answer the question. But be that as it may the Magistrate was, no doubt, wrong in this respect.

On the other hand, *Mr. Palit seems certainly to have persisted in his inquiries with considerable pertinacity, which perhaps was not unnatural, although it had the effect of inducing the Magistrate to deal with him in a way which was not justifiable.*

No doubt the error arose from a misunderstanding, and Mr. Pellew has acted with great propriety in coming forward, as he has now done, to express regret.

Under these circumstances, all that we have to say is that the order for the payment of the fine must be quashed, and that the fine, if paid, must be refunded.

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## CALCUTTA HIGH COURT.

*The 20th June, 1877.*

PRESENT:

Mr. Justice Markby and Mr. Justice Prinsep.

Case No. 2037 of 1876.

MUSST. ASBIBUN, (Defendant) *Appellant*,

*versus*

BABOO RAM PROSHAD DAS, (Plaintiff) *Respondent*.

*Voluntary Payment—ss. 72 and 15 of Act IX. of 1872.*

Money paid into Court to be paid to the decree-holder in order to stay a sale in execution, although with an intimation, to bring a suit to contest the decree-holder's right to attach and sell the property, is, upon a true construction of Sections 72 and 15 of the Contract Act is a voluntary payment and cannot be recovered back.

MR. JUSTICE MARKBY.—It appears to me that the facts of this case cannot be distinguished from those of the case reported in XII. Moore's Indian Appeals, 781; and that if that case is still law it must govern the case before us. It is there laid down that a voluntary payment with a full knowledge of the facts cannot be recovered back. But it was held that where a man pays money into Court to be paid to the decree-holder in order to stay a sale in execution expressing his intention to bring a

suit to contest the right of the decree-holder to attach and sell the property, that is not a voluntary payment, and may be recovered back if it turn out that the decree-holder had no right to sell the property. I have no doubt the plaintiff in this case was guided in what he did by the law as laid down in that decision.

But since that decision was given, and before this payment was made the matter had been dealt with by the legislature of this country. Section 72 of Act IX. of 1872 provides that a person to whom money has been paid by mistake or coercion must repay it. This I take it is the same general rule as that laid down by the Privy Council only expressed in the reverse way. But just as the Privy Council go on to determine whether a particular act was a voluntary act, so the legislature here defines generally what is coercion, and it seems to me that the meaning which the legislature had attached to the word coercion shews that a payment of the kind which the Privy Council declare to be involuntary does not come within the legislative definition of involuntary payments. In other words the legislature here takes a different view of what constituted an involuntary payment from that taken by the Privy Council. Section 15 declares that "Coercion is the committing or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement." The payment in this case was not made under any of the conditions here described.

The only question then is whether Act IX. of 1872 contains the whole law upon this subject, or whether it may be supplemented by the law as laid down by the decisions of the courts, and as contained in general principles of equity. In some respects no doubt, Act IX. of 1872 is incomplete. In the preamble it expressly said that it only explains and defines certain parts of the law of contract. But there are nevertheless, as it appears to me, some particular topics with which the legislature intended to deal completely, and I think that the matter now under consideration is one of those topics. It seems to me that if we were to hold otherwise, the provisions of the Act as to the recovery of money paid involuntarily would be entirely useless. Unless these provisions completely define the cases in which money paid may be recovered back because the payment was not voluntary, they tell us nothing at all, for as one would doubt that by the law of this country the cases specified by the Act in Sections 72 and 15 are cases in which money

may be recovered back on this ground. The important question is whether they are the only cases, and unless the legislature intended to say that they were the only cases nothing whatever will have been done towards the simplification of the law upon this subject. Every one knows the extreme difficulty that has been experienced in determining what payments are and what payments are not voluntary, and whose money once paid may be recovered back. I think the Legislature intended to get rid of this difficulty by laying down a short and simple rule upon this subject, which the courts of this country, not always trained to the discussion of these difficult questions, might easily apply of course. We may thus find ourselves barred in some cases from applying a remedy when a remedy would seem desirable, but that is not unfrequently the consequence of having fixed and precise rules of law. I therefore think that the money was not paid involuntarily and could not be recovered back, and that the decision of the courts below should be reversed and the suit dismissed with costs.

I only wish to add that there is no contention and I do not think there could be any contention that this case comes in under S. 15 of the Contract Act. But I do wish to prejudice the question whether under some circumstances a man who sets the court in motion to attach property in execution may not be said to detain property. That question does not now arise.

MR. JUSTICE PRINSEP.—I could only add to the judgment just delivered which has my entire concurrence that we can go beyond S. 72 of the Contract Act in this matter only on grounds of justice, equity and good conscience, but that as recently laid down by the Privy Council in the case of *Ram Coomar Coondoo vs. Chunder Kant Mookerjee*, these principles are to be invoked only in cases for which no specific rules may exist. On the points before us the Contract Act has laid down a specific rule and we cannot extend it or do otherwise than adhere to it.

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## CALCUTTA HIGH COURT.

*The 25th June, 1877.*

PRESENT :

Mr. Justice Markby and Mr. Justice Prinsep.

ADHORE CHUNDER BAHADOOR, (Plaintiff) *Appellant*,*versus*KISTO CHURN, NUFFUR CHURN and others, (Defendants) *Respondents*.*Acquisition of the right of occupancy under the holder of a limited interest.*

A ryot who holds land for twelve years and pays the rent payable on account of the same, acquires a right of occupancy although the person under whom he holds has only a limited, and not a hereditary, interest.

MR. JUSTICE MARKBY.—In this case the plaintiff is holder of a tenure which is not hereditary, but which is held under a grant from Government to himself upon condition of his performing certain police services. He also pays a small annual rent.

When the plaintiff obtained his grant the defendants or their ancestors had been holding the land in suit for considerably more than 12 years as under-tenants to the predecessors of the plaintiff. The predecessors of the plaintiff held the land either for a term or for life under the same conditions as it is now held by the plaintiff.

The question of law raised in this Special Appeal is whether the defendants have gained a right of occupancy?

The question depends entirely upon the words of Section 6 Act X. of 1859 repeated in Section 6 of Act VIII. of 1869 (B. C.) That Section provides that "every ryot who shall have cultivated or held land for a period of twelve years shall have a right of occupancy in the land so cultivated or held by him, whether it be held under pottabs or not, so long as he pays the rent payable on account of the same." \* \* \* \*  
"The holding of the father or other person from whom a ryot inherits shall be deemed to be the holding of the ryot within the meaning of this section."

There can be no doubt that the defendants have brought themselves within the terms of this Section. They are ryots, they have held the land for twelve years; and they have paid the rent; and the only

question can be whether the section operates where the person under whom the ryot holds has a limited interest.

If the section be looked upon as creating a sort of right by prescription in favor of the ryot against his landlord it might be said that as a general principle prescription does not run where the person in possession has a limited interest. But still the difficulty remains that this Section makes no saving in favor of such persons. Even, therefore, conceding that right of occupancy under the statute, is, in any sense, a right gained by prescription of which I am not certain, I still do not see how we can put any restriction upon the general words of the statute. The object of the statute is declared to be to re-enact with certain modifications the provisions of the existing law relative to ryots with respect to the occupancy of land. The whole law, therefore, as to rights of occupancy was renewed by the legislature and is set forth in this statute. If the legislature had intended to exclude the period during which the ryot held under a person having a limited interest it would have said so; and as it has not said so I think we must give effect to the words of the law.

This decision is in accordance with the view taken by Mr. Justice Dwarka Nath Mitter in the case reported in XVII. W. R. 552.

This is also the view of the law taken by the Court below, and the Special Appeal will therefore be dismissed with costs.

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### CALCUTTA HIGH COURT.

*The 16th July, 1877.*

PRESENT :

Mr. Justice Jackson and Mr. Justice White.

Case No. 213 of 1877.

PALEE RAM, (Plaintiff) *Appellant*,

*versus*

MUSST. JANKEE, (Defendant) *Respondent*.

*Limitation Act, Art. 62—Accounts stated.*

By the words "accounts stated" in Art. 62 of the Limitation Act, is not meant an account settled and signed by the party to be held liable, but simply an account which is stated.

JACKSON, J.—We are under the necessity of remanding this which is a matter of regret in as much as a case of such

simplicity ought not to require coming so frequently before the Courts. The error of the Judge lies in this. He says "By the words 'accounts stated' I understand to be meant an account settled and *signed* by the party to be held liable or by his agent specially authorized to sign such an account or at any rate, an account in regard to which defendant's acquiescence may be presumed in consequence of long continued silence after its receipt." The Judge refers to no authority for this view of the law nor can the respondent before us say that there is authority for such a position. The Judge therefore has not merely decided this appeal but he has legislated. All that the law requires is that the account should be stated and the period allowed by Art. 62 should commence to run from the date when the accounts are stated. It is quite possible that the defendant should be present and in examination of the accounts satisfy himself whether they are correct and it is no doubt very desirable and also usual that his signature should be attached to the amount ascertained to be due but it is not absolutely necessary. The plaintiff therefore had the choice of proof in either of two ways, either by showing that Kashi Bhugut had signed or that Bungshi Lall the alleged managing member of the defendant's family was present and did agree. The case therefore must go back in order that it may be ascertained whether the plaintiff has proved his case in either of these ways.

WHITE, J.—I agree that the case should be remanded.

## THE LAW OF MORTGAGE IN INDIA.

### SIMPLE MORTGAGES.\*

A SIMPLE mortgage is a mortgage in which the land is pledged as a collateral security, the right of the creditor in default of payment being limited to a sale by judicial process of the land hypothecated to him. In this kind of mortgage the personal liability of the mortgagor is not excluded. It corresponds to the hypothecation of the Civil law and the systems of law which are founded upon it. In a pure simple mortgage the mortgagor is not put into possession of the property pledged to him. He has not, therefore, the right to satisfy the debt out of the rents and profits, nor can he acquire the absolute ownership of the estate by foreclosure.

\* *Vide* Tagore Law Lectures—1875-76, Lecture IV., by R. B. Ghose, pp. 98 to 107.



No particular form of words is necessary to constitute a simple mortgage. Difficulties, however, not unfrequently arise owing to the extremely inartificial language of Indian instruments. In the case of *Gunga Persaud Sing v. Lalla Behary Lall*, in which the question arose whether a bare covenant by the debtor not to alienate his property till the debt should be repaid, constituted a simple mortgage so as to confer a real right on the creditor, the Court observed:—"As a general rule we adhere to the principle laid down in the case of *Chunder Kishore Surma* (9th July 1853), that the title of a person who purchases in good faith is not vitiated by any contract into which the vendor may have previously entered with a stranger binding himself not to alienate his property. If a party is desirous of obtaining a valid lien on any particular property, he should adopt the simple means which the various kinds of mortgage in use in this country afford. If he does not choose to do so, the fault is his own, and the innocent purchaser should not be made to pay the penalty of his negligence." (S. D. A., 1857, p. 825.)

It may, no doubt, be said that such a doctrine would very frequently defeat the intentions of the parties; but the rule of construction founded on the presumed intention of the parties, unless carefully fenced in, is calculated to introduce the very greatest confusion. It would carry me much beyond the limits of the present lecture to examine the various aspects of this doctrine, and there are probably many among you who are familiar with the controversies on the point in some famous writings, both ethical and juridical. There is, however, a speciousness about the rule which is betrayed only on a close examination. It is true that if the intention can be collected from the instrument, the form of expression is not material. But the real difficulty lies in collecting the intention when it is not formulated in apt words.

In the Reports of the Agra High Court you will find two cases, in one of which the Court thought that the debtor intended to create a mortgage, while in the other it was held that there was nothing to show an intention to create a charge on any property. The language of the two instruments, so far as can be gathered from the report, was almost precisely the same, the debtors covenanting with their creditors in both the cases not to alienate their properties till the debts were repaid. (*Chuney Lall v. Pallowun Sing*, 4 Agra H. C., 217; *Martin v. Purrisrum*, 2 Agra H. C., 124. See also 7 W. R., 309; 13 W. R., F. B., 82; compare N. W. P., vol. VII, p. 124; vol. VIII., p. 669.) The caustic observations of Mr. Fearn on *Perrin v. Blake* will suggest

themselves to every one familiar with the writings of that accomplished lawyer.

I will now proceed to discuss the rights of the mortgagee under a simple mortgage. We have seen that he has no right to enter upon possession of the property mortgaged to him, or to foreclose the mortgagor's equity of redemption. The only mode in which he can avail himself of his security is by a sale through judicial process of the property pledged to him under a decree of the Court, the mortgagee having a right to be paid out of the purchase money.

According to the usual practice of the mofussil Courts the mortgagee asks by his plaint for the sale of the mortgaged property, and if he succeeds he obtains a decree for the money due to him with a declaration that the mortgaged property should be sold for the realization of the money. I may mention that in the Madras Courts a period of six months is usually allowed to the mortgagor to pay the money found due to the mortgagee on his security. This indulgence, however, which seems to be borrowed from the practice of the English Court of Chancery, is not allowed to the mortgagor elsewhere, and the propriety of extending it to a decree for sale is perhaps open to question; such a decree standing upon very different ground from a decree for foreclosure. Even in England an immediate decree for sale is not unfrequently made by the Court.

The question, however, is not of much practical importance, and I have referred to it only to show how largely even in details our law of mortgage is shaped by the practice of the English Courts of Equity.

It used to be thought at one time that a purchaser under a decree which did not direct a sale, acquired no higher rights than one under an ordinary execution. Those cases, however, are no longer law, and it is now settled that the mortgagee conveys to the purchaser the benefit of his own lien and the equity of redemption of the debtor, as well when the sale is under a decree for sale as when it is under a "money decree." (*Haran Chunder Ghose v. Dinobundhoo Bose*, 23 W. R., 186.)

The doctrine that a sale under a money decree passed to the purchaser only the rights and interests of the debtor, was apparently founded on the notion that the mortgagee by accepting a money decree waived the benefit of his lien, for it could not be contended with any show of reason that the mortgagee, notwithstanding the sale, would retain the benefit of his security. But if the doctrine rested on any such notion, it was not reconcilable with the principle recognised

in a large number of cases that if the mortgagee was unable to take the land mortgaged to him in execution of a money decree, he might bring a fresh suit for the purpose of making his security available on the land. It is, however, unnecessary to pursue the discussion further, as the cases in which the right of the purchaser was limited to the bare equity of redemption possessed by the mortgagor, if the decree was only for money, are no longer law.

The Full Bench ruling, however, made another important alteration in the law as it was previously understood. It used to be thought that a sale under a mortgage passed the property to the purchaser as it stood at the date of the mortgage, and that a decree for sale made in the presence of the mortgagor, but in the absence of the puisne encumbrancers or other persons possessing only a qualified interest in the equity of redemption, was a good decree and passed a complete title to the purchaser.

As the law, however, now stands, it would not be safe for the mortgagee to sell the property pledged to him under a decree not made in the presence of the subsequent encumbrancers, who cannot be concluded by an order for sale made in their absence.

"If there be persons not parties to the suit claiming an interest in the property, no form of dealing with the property in their absence can prejudice their rights." (Per Couch, C. J., in *Haran Chunder Ghose v. Dinobundhoo Bose*, 28 W. R., 190.) The rights, however, of the subsequent encumbrancers are nowhere defined in the judgment. It is only said that the purchaser under a decree made in their absence purchases the property subject to their rights. He buys the lien of the creditor and the equity of redemption of the debtor, the entire interest which they could jointly sell, and if there are no third persons interested in the property, it becomes absolutely vested in the purchaser.

The doctrine, therefore, which is to be found in some of the cases in the books that a sale by a mortgagee conveys the property to the purchaser free of all subsequent encumbrances must now be received with some qualification. A mortgagee is no doubt competent to transfer the property to the purchaser in the state in which it was pledged to him, but this can only be effected by a sale under a decree in which the subsequent encumbrancers are represented. If the sale take place under a decree against the mortgagor alone, no complete title passes to the purchaser.

I have already said that the Court did not, in the case of *Haran*

Chunder Ghose, define the rights of the subsequent encumbrancers as against the purchaser under a decree made in their absence.

The question, however, arose in the subsequent case of *Nobocoomar Ghose* against *Uzir Shikdar*, in which the debtor having mortgaged his property to two persons in succession, the first mortgagee brought a suit and obtained a decree, but only against the debtor. The property was sold under the decree and purchased by the mortgagee himself. The second mortgagee also sued the debtor, and the property was again sold under the decree and purchased by the creditor. The Court held that the purchaser under the first decree was entitled to possession, but that, as the puisne mortgagee was not a party to the decree under which the purchaser acquired his title, the purchaser under the second decree had a right to pay off the amount due under the first mortgage, and that upon such payment he would be the "holder of the first charge" on the property. You will observe that this case recognises the right of a puisne encumbrancer to pay off the debt on account of which the estate may have been sold, and thus to treat the purchaser as the owner of the estate subject to his claim. As to the question of possession the Court held that the right to the possession was in the debtor and passed to the purchaser under the first execution. The question which we are now considering is a somewhat difficult one, and I shall, therefore, try to illustrate the principle laid down by the Court by putting a hypothetical case. Now suppose an estate is worth Rs. 20,000, and that it is mortgaged first to A for Rs. 15,000 and then to B for Rs. 3,000. The interest which remains in the debtor after the execution of the mortgage is, therefore, worth only Rs. 2,000. Now suppose the property is sold by A in execution of a decree against the debtor and in the absence of B. The purchaser purchases only the lien of the creditor and the right of redemption subsisting in the debtor, which together is by the hypothesis worth Rs. 15,000 plus 2,000 = Rs. 17,000. Now B would have a right to pay off the debt due under the first mortgage, and to treat such payment, together with the amount due to him, as a charge on the property, i. e., by paying off to the purchaser the fifteen thousand due under the first mortgage, he would acquire a charge on the property for Rs. 15,000 plus 3,000 = Rs. 18,000. Now, in order to enforce that charge he would have to bring a suit against the purchaser who, as we have seen, has acquired the right of redemption of the debtor. Now if the purchaser pays him off, he acquires an absolute title to the property. But in that case he would have to pay

altogether Rs. 17,000 minus 15,000, i. e., Rs. 2,000 plus 18,000 = 20,000, which we have assumed to be the value of the property. But suppose the purchaser does not choose to pay off the consolidated charge on the property, the property must be sold, and assuming that it fetches its proper price, the mortgagee gets Rs. 18,000, and the purchaser gets back the two thousand rupees which he had laid out. If the property is so heavily burdened that the right of redemption is worth nothing, the purchaser would not be safe in paying anything in excess of the debt due under the first mortgage. To that extent he would be secure against the claims of subsequent encumbrancers. If the purchaser pays less than the amount of the debt secured by the first mortgage, he cannot insist upon the second mortgagee paying to him anything in excess of the purchase money, although I am not to be understood as saying that the case might not be different if the creditor himself became the purchaser.

### CALCUTTA HIGH COURT.

*The 23rd July and 12th September, 1877.*

FULL BENCH.

PRESENT :

The Hon'ble Sir Richard Garth, Knight, Chief Justice, the Hon'ble Louis S. Jackson, the Hon'ble A. G. Macpherson, the Hon'ble W. Markby, and the Hon'ble W. Ainslie, JJ.

*Section 2 of Act VIII. of 1859—Res-judicata—Intervenor.*

Case No. 718 of 1876.

GOBIND CHUNDER KOONDoo and others, (Plaintiffs) *Appellants*,

*versus*

TARUCK CHUNDER BOSE and others, (Defendants) *Respondents*.

A suit is barred under Section 2 of Act VIII. of 1859, if the right and title which is the subject of the present claim, was substantially in issue and determined between the same parties in a former suit, although the plaintiff in the one case may be the defendant in the other. *Held* also, that if in a rent suit a third party chose to intervene and raise a question of title as between himself and the plaintiff, he must be bound by the decision in that suit, and he cannot raise the same question again in a subsequent suit.

This case was referred by the Chief Justice Garth, and Mr. Justice Mitter on the 29th March 1877.

Reference.—This was a suit brought by the plaintiffs to recover possession of a 1 anna share of a certain jote.

In the year 1871 the plaintiffs claimed to be entitled to a 15 annas share of the said jote, and the defendant No. 1 to a one anna share thereof.

In that year the superior landlord of the jote sued some persons other than the defendant No. 1 for rent of the entire jote and obtained a decree against them; under which the said tenure was put up for sale, and purchased by the defendant No. 4, who again sold the same share to all the plaintiffs in the name of the plaintiff No. 1.

The defendant No. 1 then brought a suit (No. 1174 of 1872) for arrears of rent of the one anna share against the occupying tenant of the jote, Mohun Chunder Dass, in which suit the plaintiff No. 1, intervened as a defendant, upon the ground that he, and not the present defendant No. 1, was entitled to the rent claimed.

Thereupon the question was raised in that suit, whether the then plaintiff (the defendant No. 1,) or the then defendant (the present plaintiff No. 1) was entitled to the rent as owner of the one anna share, and that question was adjudicated upon and decided against the present plaintiff.

The intervening defendant in that case, (the present plaintiff No. 1), claimed to be the owner of the entire jote by virtue of the said sale to him on behalf of all the present plaintiffs, and the only question in this suit is whether the plaintiffs, (by virtue of that sale) are the owners of the one anna share of the jote as against the defendant No. 1 the plaintiff in the former suit.

Both the Lower Courts have held that the plaintiffs are barred by the judgment in the former suit, (by virtue of Section 2 Act VIII. of 1859) upon the grounds that the self same question which was there raised and decided is also raised in this suit.

The question has now come before us in special appeal; and as there appear to be conflicting decisions of this Court upon it, (See *Mussummat Suslubuth Koer versus Sheik Embhood Ali*, 24 W. R. C. R. 44. *Mohima Chunder Mojoomdar versus Usradha Dassea*, 21 W. R. 207. *Deokee Nundun Roy versus Kali Pershad and others*, VIII. W. R. 366,) and as the point is one of general importance, we think it right to refer the question to a Full Bench.

The question is, whether under the circumstances stated, the plaintiffs are barred by the judgment in the former suit.

Judgment of the Full Bench.

GARTH, C. J.—I am of opinion that in this case the plaintiffs are barred by the former judgment.

It is to be observed, that the present suit is not to recover *khas* possession of the property in question. The land is in the occupation

of a tenant, and the plaintiffs' only object is to establish their title to it as against the defendant No. 1.

We have therefore to see, whether the right and title which is the subject of claim in this suit, was not the very same right and title which was in issue between the same parties, and determined, in the former suit.

When once it is made clear, that the self same right and title was substantially in issue in both suits, the precise form in which the suit was brought, or the fact that the plaintiff in the one case was the defendant in the other, becomes immaterial.

Now in this instance the plaintiff in the former suit is the same person as the defendant No. 1 in this; and he sued to recover from the occupying tenant the rent of the property now in dispute. In that suit one of the present plaintiffs (representing and claiming the same right under the same title which is now claimed by all the plaintiffs), intervened as a defendant, and he resisted the plaintiffs' claim to the rent, upon the ground that he (representing the present plaintiffs' interest) was entitled to it as the owner of the property :

An issue was accordingly framed in that suit as to whether the then plaintiff (the present defendant No. 1) was entitled to the rent as owner of the property in question, as against the then defendant who represented the present plaintiffs. This question was contested between them in that suit upon the same title and materials which are now brought forward in the present suit; and the only difference is, that the plaintiff in that suit is the defendant in this.

On the other hand, it is argued by the appellant, that the claim in the former suit was *for rent against the tenant*, that the only issue in that case was whether the plaintiff was entitled to that rent and that the question of title raised by the intervening defendant was only incidental to the main issue. But as between the plaintiff and the intervening defendant the question, and the only question, was that of title, and as the defendant in that suit chose to intervene, and to raise that question between himself and the plaintiff, he, and those whom he represented, must take the consequences of, their intervention.

Our decision in this case will be found entirely in accordance with the views expressed by the Full Bench in the case of *Hurree Sunker Mookerjee versus Kristo Pattro and others*, XXIV. W. R. 154.

The appeal will be dismissed with costs.

## PRINCIPLES OF THE INDIAN PENAL CODE.

*[As explained by the original framers and laid before the Governor-General of India in Council in the year 1837.]*

## NOTE B.

## ON THE CHAPTER OF GENERAL EXCEPTIONS.

This Chapter has been framed in order to obviate the necessity of repeating in every penal clause a considerable number of limitations.

Some limitations relate only to a single provision, or to a very small class of provisions. Thus the exception in favor of true imputations on character (Clause 470) is an exception which belongs wholly to the law of defamation, and does not affect any other part of the Code. The exception in favor of the conjugal rights of the husband (Clause 359) is an exception which belongs wholly to the law of rape, and does not affect any other part of the Code. Every such exception evidently ought to be appended to the rule which it is intended to modify.

But there are other exceptions which are common to all the penal Clauses of the Code or to a great variety of Clauses dispersed over many Chapters. Such are the exceptions in favor of infants, lunatics, idiots, persons under the influence of delirium; the exceptions in favor of acts done by the direction of the law, of acts done in the exercise of the right of self-defence, of acts done by the consent of the party harmed by them. It would obviously be inconvenient to repeat these exceptions several times in every page. We have, therefore, placed them in a separate Chapter, and we have provided that every definition of an offence, every penal provision, and every illustration of a definition or penal provision, shall be construed subject to the provisions contained in that Chapter. Most of those explanations appear to us to require no explanation or defence. But the meaning and the ground of the rules laid down in Clause 69 and in the three following Clauses may not be obvious at first sight. On these therefore we wish to make a few observations.

We conceive the general rule to be that nothing ought to be an offence by reason of any harm which it may cause to a person of ripe age who, undeceived, has given a free and intelligent consent to suffer that harm or to take the risk of that harm. The restrictions by which the rule is limited affect only cases where human life is concerned. Both the general rule and the restrictions may, we think, be easily vindicated.



If Z, a grown man, in possession of all his faculties, directs that his valuable furniture shall be burned, that his pictures shall be cut to rags, that his fine house shall be pulled down, that the best horses in his stables shall be shot, that his plate shall be thrown into the sea, those who obey his orders, however capricious those orders may be, however deeply Z may afterwards regret that he gave them, ought not, as it seems to us, to be punished for injuring his property. Again, if Z. chooses to sell his teeth to a dentist, and permits the dentist to pull them out, the dentist ought not to be punished for injuring Z's person. So if Z embraces the Mahomedan religion, and consents to undergo the painful rite which is the initiation into that religion, those who perform the rite ought not to be punished for injuring Z's person.

The reason on which the general rule which we have mentioned rests is this, that it is impossible to restrain men of mature age and sound understanding from destroying their own property, their own health, their own comfort, without restraining them from an infinite number of salutary or innocent actions. It is by no means true that men always judge rightly of their own interest. But it is true that, in the vast majority of cases, they judge better of their own interest than any lawgiver, or any tribunal, which must necessarily proceed on general principles, and which cannot have within its contemplation the circumstances of particular cases and the tempers of particular individuals, can judge for them. It is difficult to conceive any law which should be effectual to prevent men from wasting their substance on the most chimerical speculations, and yet which should not prevent the construction of such works as the Duke of Bridgewater's Canals. It is difficult to conceive any law which should prevent a man from capriciously destroying his property, and yet which should not prevent a philosopher, in a course of chemical experiments, from dissolving a diamond, or an artist from taking ancient pictures to pieces, as Sir Joshua Reynolds did, in order to learn the secret of the coloring. It is difficult to conceive any law which should prevent a man from capriciously injuring his own health, and yet which should not prevent an artisan from employing himself in callings which are useful and indeed necessary to society, but which tend to impair the constitutions of those who follow them, or a public-spirited physician from inoculating himself with the virus of a dangerous disease. It is chiefly, we conceive, for this reason that almost all Governments have thought it sufficient to restrain men from harming others, and have left them at liberty to harm themselves.

But though in general we would not punish an act on account of any harm which it might cause to a person who had consented to suffer that harm, we think that there are exceptions to this rule, and that the case in which death is intentionally inflicted is an exception.

It appears to us that the reasons which render it highly inexpedient to inflict punishment in ordinary cases of harm done by consent of the person harmed do not exist here. The thing prohibited is not, like the destruction of property, or like the mutilation of the person, a thing which is sometimes pernicious, sometimes innocent, sometimes highly useful. It is always, and under all circumstances, a thing which a wise lawgiver would desire to prevent, if it were only for the purpose of making human life more sacred to the multitude. We cannot prohibit men from destroying the most valuable effects, or from disfiguring the person of one who has given his unextorted and intelligent consent to such destruction or such disfiguration, without prohibiting at the same time gainful speculations, innocent luxuries, manly exercises, healing operations. But by prohibiting a man from intentionally causing the death of another, we prohibit nothing which we think it desirable to tolerate.

It seems to us clear, therefore, that no consent ought to be a justification of the intentional causing of death. Whether such intentional causing of death ought or ought not to be punished as murder is a distinct question ; and will be considered elsewhere.

The next point which we have here to consider is how far consent ought to be a justification of the causing of death, when that causing of death is, in our nomenclature, voluntary, yet not intentional, that is to say when the person who caused the death did not mean to cause it but knew that he was likely to cause it.

In general we have made no distinction between cases in which a man causes an effect designedly, and cases in which he causes it with a knowledge that he is likely to cause it. If, for example, he sets fire to a house in a town at night, with no other object than that of facilitating a theft, but being perfectly aware that he is likely to cause people to be burned in their beds, and thus causes the loss of life, we punish him as a murderer. But there is, as it appears to us, a class of cases in which it is absolutely necessary to make a distinction. It is often the wisest thing that a man can do to expose his life to great hazard. It is often the greatest service that can be rendered to him to do what may very probably cause his death. He may labor under a cruel and wasting

malady which is certain to shorten his life, and which renders his life, while it lasts, useless to others and a torment to himself. Suppose that under these circumstances he, undeceived, gives his free and intellect consent to take the risk of an operation which in a large proportion of cases has proved fatal, but which is the only method by which his disease can possibly be cured, and which, if it succeeds, will restore him to health and vigor. We do not conceive that it would be expedient to punish the Surgeon who should perform the operation, though by performing it he might cause death, not intending to cause death, but knowing himself to be likely to cause it. Again; if a person attacked by a wild beast should call out to his friends to fire, though with imminent hazard to himself, and they were to obey the call, we do not conceive that it would be expedient to punish them, though they might by firing cause his death, and though when they fired they knew themselves to be likely to cause his death.

We propose therefore that it shall be no offence to do even what the doer knows to be likely to cause death if the sufferer being of ripe age has, undeceived, given a free and intelligent consent to stand the risk, and if the doer did not intend to cause death, but on the contrary intended in good faith the benefit of the sufferer.

We have now explained the provisions contained in Clauses 69 and 70. The cases to which the two next Clauses relate bear a close affinity to those which we have just considered.

A lunatic may be in a state which makes it proper that he should be put into a strait waistcoat. A child may meet with an accident which may render the amputation of a limb necessary. But to put a strait waistcoat on a man without his consent is, under our definition, to commit an assault. To amputate a limb is by our definition voluntarily to cause grievous hurt, and, as sharp instruments are used, is a very highly penal offence. We have therefore provided by Clause 71, that the consent of the guardian of a sufferer who is an infant or who is of unsound mind shall, to a great extent, have the effect which the consent of the sufferer himself would have, if the sufferer were of ripe age and sound mind.

That there should be some provision of this sort is evidently necessary. On the other hand we feel that there is a considerable danger in allowing people to assume the office of judging for others in such cases. Every man always intends in good faith his own benefit, and has a deeper interest in knowing what is for his own benefit than any body else

can have. That he gives a free and intelligent consent to suffer pain or loss, creates a strong presumption that it is good for him on the whole to suffer that pain or loss. But we cannot safely confide to him the interest of his neighbours, in the same unreserved manner in which we confide to him his own, even when he sincerely intends to benefit his neighbours. Even parents have been known to deliver their children up to slavery in a foreign country, to inflict the most cruel mutilations on their male children, to sacrifice the chastity of their female children, and to do all this, declaring, and perhaps with truth, that their object was something which they considered as advantageous to the children. We have therefore not thought it sufficient to require that on such occasions the guardian should act in good faith for the benefit of the ward. We have imposed several additional restrictions which we conceive, carry their defence with them.

There yet remains a kindred class of cases which are by no means of rare occurrence. For example, a person falls down in an apoplectic fit. Bleeding alone can save him, and he is unable to signify his consent to be bled. The Surgeon who bleeds him commits an act falling under the definition of an offence. The Surgeon is not the patient's guardian; and has no authority from any such guardian. Yet it is evident that the Surgeon ought not to be punished. Again, a house is on fire. A person snatches up a child too young to understand the danger, and flings it from the house top, with a faint hope that it may be caught in a blanket below, but with the knowledge that it is highly probable that it will be dashed to pieces. Here, though the child may be killed by the fall, though the person who threw it down knew that it would very probably be killed, and though he was not the child's parent or guardian, he ought not to be punished.

In these examples there is what may be called a temporary guardianship justified by the exigency of the case and by the humanity of the motive. This temporary guardianship bears a considerable analogy to that temporary magistracy with which the law invests every person who is present when a great crime is committed, or when the public peace is concerned. To acts done in the exercise of this temporary guardianship, we extend by Clause 72 a protection very similar to that which we have given to the acts of regular guardians.

Clause 73 is intended to provide for those cases which, though, from the imperfections of language, they fall within the letter of the penal law, are yet not within its spirit, and are all over the world con-

sidered by the public, and for the most part dealt with by the tribunals, as innocent. As our definitions are framed, it is theft to dip a pen in another man's ink, mischief to crumble one of his wafers, an assault to cover him with a cloud of dust by riding past him, hurt to incommode him by pressing against him in getting into a carriage. There are innumerable acts without performing which men cannot live together in society, acts which all men constantly do and suffer in turn, and which it is desirable that they should do and suffer in turn, yet which differ only in degree from crimes. That these acts ought not to be treated as crimes is evident, and we think it far better expressly to except them from the penal clauses of the Code than to leave it to the Judges to except them in practice. For if the Code is silent on the subject, the Judges can except these cases only by resorting to one of two practices which we consider as most pernicious, by making law, or by wresting the language of the law from its plain meaning.

We propose (Clauses 74 to 84) to except from the operation of the penal clauses of the Code large classes of acts done in good faith for the purpose of repelling unlawful aggressions. In this part of the Chapter we have attempted to define, with as much exactness as the subject appears to us to admit, the limits of the right of private defence. It may be thought that we have allowed too great a latitude to the exercise of this right; and we are ourselves of opinion that if we had been framing laws for a bold and high-spirited people, accustomed to take the law into their own hand, and to go beyond the line of moderation in repelling injury, it would have been fit to provide additional restrictions. In this country the danger is on the other side. The people are too little disposed to help themselves. The patience with which they submit to the cruel depredations of gang-robbers, and to trespass and mischief committed in the most outrageous manner by bands of ruffians, is one of the most remarkable, and at the same time one of the most discouraging symptoms which the state of society in India presents to us. Under these circumstances we are desirous rather to rouse and encourage a manly spirit among the people than to multiply restrictions on the exercise of the right of self-defence. We are of opinion that all the evil which is likely to arise from the abuse of that right is far less serious than the evil which would arise from the execution of one person for overstepping what might appear to the Courts to be the exact line of moderation in resisting a body of dacoits.

We think it right however to say that there is no part of the Code

with which we feel less satisfied than this. We cannot accuse ourselves of any want of diligence or care. No portion of our work has cost us more anxious thought or has been more frequently re-written. Yet we are compelled to own that we leave it still in a very imperfect state ; and though we do not doubt that it may be far better executed than it has been by us, we are inclined to think that it must always be one of the least exact parts of every system of criminal law.

### PRIVY COUNCIL.

*The 12th, 13th and 25th July, 1877.*

PRESENT :

Sir J. W. Colville, Sir Barnes Peacock, Sir M. E. Smith and Sir R. P. Collier.

*On appeal from Calcutta High Court.*

DEEN DYAL\* (Defendant) *Appellant*,

*versus*

JUGDEEP NARAIN SINGH (Plaintiff) *Respondent*.

*Mitakshara Joint Estate—Sale of Share in Execution—Rights of Purchaser.*

The rights and proprietary and mokurruri title and share of a Hindu father in the joint family estate under Mitakshara law having been seized and sold in execution of a decree against him, possession of the whole estate was delivered to the Appellant as purchaser.

In a suit by the Respondent, the son of the judgment debtor, to recover the same on the ground that it could not be sold in execution without proof of legal necessity for the debt :—

*Held*, assuming that a member of a Mitakshara joint family may not dispose of his share in the joint estate by voluntary conveyance without the concurrence of his coparceners, that the Appellant, as purchaser at an execution sale of such share, was entitled to ascertain the same by such partition as the judgment debtor might have compelled before the alienation of his share took place.

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILLE :—

The Respondent in this case is the only son of one *Toofani Singh*, and, the family being governed by the law of the Mitakshara, is joint in estate, in the strict sense of the term, with his father. On the 28th of January, 1863, the father being indebted to the Appellant to the amount of Rs. 5000, executed to him a Bengali mortgage bond for securing the repayment of that sum with interest at the rate of 12 per cent. per annum. The Appellant afterwards put this bond in suit, and

on the 30th of May, 1864, obtained a decree against *Toofani Singh* for the sum of Rs. 6,328. 13a. 8p. He took no proceedings to enforce this decree, which was in the form of an ordinary decree for money, against the property especially hypothecated ; but in September, 1870, caused "the rights and proprietary and mokurruri title and share of *Toofani Singh*, the judgment debtor" in the joint family property which is the subject of this suit, to be put up for sale in two lots for the realization of the sum of Rs. 11,144. 6a. 4p., the amount alleged to be then due on the decree ; and himself became the purchaser of those lots for the sums of Rs. 900 and Rs. 10,100. Objections were taken to this sale by the judgment debtor, which, after going through all the Courts, were finally overruled, and the Appellant obtained the usual certificate title, and in January, 1871, succeeded in taking possession thereunder of the whole of the property now in dispute. Thereupon, in February, 1871, the Respondent brought the suit out of which this appeal arises for the recovery of the whole property on the ground that being according to the law of the Mitakshara the joint estate of himself and his father, it could not be taken or sold in execution for the debt of the latter, which had been incurred without any necessity recognised by the Shastras or the law. The father was joined as a Defendant.

The issues on the merits settled in the cause were—

1. Did *Toofani Singh* borrow money from the Defendant (the Appellant) under a legal necessity or without a legal necessity ? and are the auction sales and other proceedings taken in satisfaction of the debt all illegal, and ought they to be set aside or not ?

2. Under the Mitakshara law, is the Plaintiff entitled to the entire property sold in satisfaction of his father's debts, or to how much ?

3. Was some portion of mouzah *Domawun* personally acquired by the Plaintiff's father, or was it acquired by the ancestral funds and property ?

A good deal of evidence was given in the Court of first instance as to the nature of the debt incurred by *Toofani Singh*, and upon the issue whether it was borrowed under a legal necessity. Upon the face of the bond the debt is ostensibly that of the father alone ; there is no statement that the money was borrowed for the purposes of the joint family, or so as to bind co-sharers in the estate. The oral evidence adduced by the Plaintiff was directed to shew that his father, who had passed five years in jail on a conviction for forgery, had both before and since his imprisonment lived an immoral and disreputable life, not residing with

and rarely visiting his family ; and that the money was borrowed on his sole credit, and spent by him in riotous living. On the other hand the Defendant (the Appellant) brought witnesses to prove that part at least of the money, viz., Rs. 1,500, was expressly borrowed in order to provide for the marriage expenses of one of the daughters of the family ; and, generally, that the Plaintiff was cognisant of his father's transactions, and the whole debt one which bound both co-sharers.

The Subordinate Judge does not appear to have thought it necessary to come to any definite conclusion upon this issue. In one passage of his judgment he says, " The sale being held by the Court, it is unnecessary to see whether it was held under a legal necessity or not." In another passage he says, " The sale held by the Court, according to the laws in force, of the ancestral estate, as the rights and interests of the judgment debtor, cannot be regarded as including the right of the son of the judgment debtor which he derived under the Shastras ; and so far as the Plaintiff's share is concerned, the sale cannot be confirmed." This seems to be the ground on which he proceeded ; for he gave the Plaintiff a decree for one moiety of all the property claimed, except a small portion which he held was the separate acquisition of the father.

On appeal this decree was reversed by the Zillah Judge of *Gyah*, who dismissed the suit on the ground (amongst others) that a legal necessity to borrow the money had been established, and consequently that not merely the particular share of the property that may have belonged to *Toofani Singh*, but the whole undivided estate was liable for the debt.

The Respondent then brought his case before the High Court by special appeal, which, by its decree of the 14th of June, 1873, reversed the decree of the lower Appellate Court, and ordered that the Plaintiff should obtain possession from the Defendants of the property which was the subject of suit for the benefit of the joint family. The present appeal, which has been heard *ex parte*, is against that decree.

A good deal of the argument at their Lordships' bar was addressed to the question of the nature of the judgment debt, and whether or not there was "legal necessity" for the loans of which it was composed. Whatever may be their Lordships' opinion of the finding of the Zillah Judge upon this point, they must, for the purposes of this appeal, treat it as conclusive. The appeal is only from the order on special appeal ; and on that special appeal the High Court could not have disturbed the finding of the Lower Appellate Court on this question of fact, unless



there was no evidence at all to support it. And this, whatever was the character and weight of the evidence, cannot be affirmed.

This issue, however, seems to their Lordships to be immaterial in the present suit, because whatever may have been the nature of the debt, the Appellant cannot be taken to have acquired by the execution sale more than the right, title, and interest of the judgment debtor. If he had sought to go further, and to enforce his debt against the whole property, and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it. By the proceedings which he took he could not get more than what was seized and sold in execution, viz., the right, title, and interest of the father. If any authority be required for this proposition it is sufficient to refer to the cases of *Nugenderchunder Ghose v. Srimutty Kaminee Dossee* (1) and *Baijun Doobey v. Brij Bhookun Lall Awasti* (2).

The first and principal question, however, that arises on this appeal is, whether the Appellant acquired a good title even to the right, title, and interest of the father; whether under the law of the Mitakshara the share of one co-sharer in a joint family estate can be taken and sold in execution of a decree against him alone. In lower *Bengal*, where this question can arise only between brothers or other collaterals (sons not having as against their father in his life-time, under the law of the *Dayabhaga*, the rights which they have under the law of the *Mitakshara*), it is settled law that the right, title, and interest of one co-sharer in a joint estate may be attached and sold in execution to satisfy his personal debt; and that the purchaser under such an execution stands in the shoes of the judgment debtor, and acquires the right as against the other co-sharers to compel a partition.

That a similar rule prevails in the south of *India*, though the law there administered is founded on the *Mitakshara*, is shewn by two cases decided by the High Court of *Madras*: *Virāsvāmi Grāmini v. Ayyasvami Grāmini* (3), and *Palani Velappa Kaundan v. Mannaru Naickan* (4). The latter case was one in which, as here, the coparceners were father and son. And that the law is to the same effect in the Presidency of *Bombay* was ruled in the two cases which are reported at pp. 32 and 182 of the first volume of the *Bombay High Court Reports*.

(1) 11, Moore's Ind. Ap. Ca. 241.

(3) 1, Madras H. C. R., 471.

(2) Law Rep. 2 Ind. Ap. 275.

(4) 2, Madras H. C. R., 416.

All these cases, however, affirm not merely the right of a judgment creditor to seize and sell the interest of his debtor in a joint estate, but also the general right of one member of a joint family to dispose of his share in a joint estate by voluntary conveyance without the concurrence of his coparceners. This latter proposition is certainly opposed to several decisions of the Courts of *Bengal*.

In 1869 the question was carefully considered by the High Court of *Calcutta*. A Division Bench of that Court referred it to a Full Bench in the case of *Sadabart Persad Sahu v. Phoolbask Koer*.

The decision of the Full Bench is reported in the third volume of the *Bengal Law Reports*, Full Bench Rulings, p. 31. The Chief Justice, after reviewing all the authorities, came, with the concurrence of his colleagues, to the conclusion that under the law of the Mitakshara, as administered in the Presidency of *Fort William*, "*Bhagwan Lal*," whose act was in question, "had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family." The Full Bench so reported to the Division Bench, and the latter then made its final decree in the cause, which involved many other questions. From that decree there was an appeal to Her Majesty in Council, which was heard *ex parte*. This Committee, for the reasons stated in their judgment, which is reported in the Law Rep. 3 Ind. App. p. 7, did not think it necessary or expedient either to affirm or disaffirm the ruling of the Full Bench on this point. Their Lordships (p. 30) said they "abstained from pronouncing any opinion upon the grave question of Hindu law involved in the answer of the Full Bench to the second point referred to them, a question which, the appeal coming on *ex parte*, could not be fully or properly argued. That question must continue to stand, as it now stands, upon the authorities, unaffected by the judgment on this appeal."

It is, however, to be observed that even the Full Bench in the case under consideration, recognised a possible distinction between the sale of a share in a joint estate under an execution, and an alienation by the voluntary act of a co-sharer, and thought that the former might be valid, though the latter was invalid. In dealing with the first question referred to the Full Bench, the Chief Justice, at p. 37 of the Report, says :—

"It is unnecessary for us to decide whether, under a decree against *Bhagwan* in his lifetime, his share of the property might have been

seized, for that case has not arisen. According to a decision in *Stokes' Reports*, it might have been seized, but the case as against *Bhagwan* and that against the survivors are very different. So long as *Bhagwan* lived, he had an interest in this property which entitled him, if he had pleased, to demand a partition, and to have his share of the joint estate converted into a separate estate."

The decision in *Sadabari's Case* has been followed by, amongst others, that of *Mahabeer Persad v. Ramyad Singh* (1), being the case referred to in the judgment under appeal as No. 209 of 1872.

That was a decision by the two learned Judges who passed the decree now under appeal, and the circumstances of the one case are nearly the same as those of the other. In that of 1872, the father had borrowed the money ostensibly on his sole credit, and given a Bengali mortgage bond to secure it. The bondholder had sued on his bond, obtained a decree, taken out execution against joint property, and become the purchaser of it at the execution sale. The distinction between that case and the present is that the property seized and sold was that which was specially hypothecated by the bond. The sons sued to recover the property. There was a clear finding against the alleged "necessity" for the loan. The Court laid down in the strongest terms (see p. 94) the law as established by the Full Bench ruling in *Sadabari's Case*, and other decisions, and appears to have assumed that a title acquired by means of a execution sale stood on no higher ground than one founded on a voluntary alienation.

It asserted, however, the power of imposing equitable terms upon the son, whom they held entitled to recover; and these terms were, in effect, that the property, when recovered, should be held and enjoyed by the family in defined shares; and that the share of the father, the judgment debtor, should be subject to the lien of the judgment creditor for the money advanced, with interest. In the present case the same Judges have refused to recognise any such equity, proceeding on the ground that the execution was taken out not against the property specially hypothecated, but against the general estate.

It is difficult to see upon what principle the hypothecation of the property in question can be taken to improve the position of the creditor; since the very act of hypothecation implies a violation of the rule laid down in *Sadabari's Case*. It is further to be observed that in one res-

pect the equity of the creditor is stronger in the present case than it was in that of 1872 ; since here it has been found by the Lower Appellate Court that " legal necessity to borrow the money existed ;" whereas, in the case of 1872, there was a clear finding the other way. Their Lordships, therefore, are of opinion that the reasons which the learned Judges have given do not justify their refusal to give to the Defendant in this case the benefit of the equity which they enforced in the other.

But what is the effect of the decision of 1872 ? It is a clear authority for the proposition that, although by the law as settled in that part of the presidency of *Fort William* which is governed by the *Mitakshara*, a member of a joint family cannot incumber his share in joint property without the consent, express or implied, of his copartners, the purchaser of it at an execution sale nevertheless acquires a lien upon it to the extent of his debtor's share and interest.

There appears to be little substantial distinction between the law thus enunciated and that which has been established at *Madras* and *Bombay* ; except that the application of the former may depend upon the view the Judges may take of the equities of the particular case ; whereas the latter establishes a broad and general rule defining the right of the creditor.

Their Lordships, finding that the question of the rights of an execution-creditor, and of a purchaser at an execution sale, was expressly left open by the decision in *Sadabart's Case*, and has not since been concluded by any subsequent decision which is satisfactory to their minds, have come to the conclusion that the law, in respect at least of those rights, should be declared to be the same in *Bengal* as that which exists in *Madras*. They do not think it necessary or right in this case to express any dissent from the ruling of the High Court in *Sadabart's Case* as to voluntary alienations. But however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does, exist between them. It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value.

It seems to their Lordships that the same principle may and ought

to be applied to shares in a joint and undivided Hindu estate ; and that it may be so applied without unduly interfering with the peculiar *status* and rights of the coparceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place.

In the present case their Lordships are of opinion that they ought not to interfere with the decree under appeal so far as it directs the possession of the property, all of which appears to have been finally and properly found to be joint family property, to be restored to the Respondent. But they think that the decree should be varied by adding a declaration that the Appellant, as purchaser at the execution sale, has acquired the share and interest of *Toofani Singh* in that property, and is entitled to take such proceedings as he shall be advised to have that share and interest ascertained by partition. And they will humbly advise Her Majesty accordingly. They desire to add that they cannot make any more precise declaration as to *Toofani Singh's* share, since, if a partition takes place, his wife may be entitled to a share ; and, further, that there will be no order as to the costs of this appeal.

### IMPORTANT DIRECTION.

*Note* that the case of *Kellie vs. Fraser* in 5, Legal Companion, p. 216. (Copy for September 1877) has been reported in the Indian Law Reports, 2 Calcutta Series, p. 445, (Copy for December 1877.)

### SHORT NOTES.

#### CALCUTTA HIGH COURT.

*Appeal—Presidency Magistrates' Act (IV. of 1877), s. 41.*

No appeal lies from the order of a Judge directing a prosecution under s. 41 of the Presidency Magistrates' Act.

*Vide* I. L. R., 2 Calc., p. 466. Janokey Nath Roy, *Petitioner*.

*Limitation—Act IX. of 1871, ss. 20, 21 ; Sch. II., arts. 167, 169—  
Execution Proceedings.*

The word 'debt' in ss. 20 and 21 of Act IX. of 1871 applies only to a liability for which a suit may be brought, and does not include a liability for which judgment has been obtained : therefore, where the

last application for execution of a decree had been made on the 14th of December, 1872, and a notice under s. 216 Act VIII. of 1859 issued on the 19th of January, 1873, and on the 28th of April, 1873, the judgment-debtor filed a petition notifying part-payment, which petition was signed by the judgment-creditor,—*held*, in an application for execution made on the 27th of April, 1876, that further execution was barred by limitation.

*Vide* I. L. R., 2 Calc., p. 468. Kally Prosonno Hazra vs. Heera Lall Mundle,

*Special Appeal—Jurisdiction—Small Cause Court—Claim under Rs. 500—Question of Title—Act XXIII. of 1861, s. 27—Act XI. of 1861, s. 6.*

No special appeal lies to the High Court in a suit cognizable by the Small Cause Court, although a question of title to immoveable property has been raised and tried in the Court below.

*Vide* I. L. R., 2 Cal. 470. Mohesh Mahto vs. Sheik Peru, (Full Bench.)

*Civil Procedure Code (Act VIII. of 1859), s. 78—Adding Parties—Amending Plaintiff.*

Under s. 73, Act VIII. of 1859, a person is not liable to be added as a party to the suit, although he may be “likely to be affected by the result,” unless he is also entitled to or claims some interest in the subject-matter of the suit.

*Vide* I. L. R., 2 Calc., p. 472. Koegler vs. Prosonno Coomarr Chatterjee.

*Co-sharers—Izaradar—Enhancement of Rent—Beng. Act VIII. of 1869, s. 18.*

An izaradar is entitled to enhance the rent of ryots holding under him where there is no condition or stipulation in his lease precluding him from so doing.

One of several joint proprietors may, without making his joint proprietors parties, bring a suit for enhancement of rent against ryots holding under him, from whom he has been in the habit of realizing separate rents.

The Full Bench Ruling in *Doorga Churn Surma v. Jampa Dossee* (12 B. L. R., 289; S. C., 21 W. R., 46) distinguished.

*Vide* I. L. R., 2 Calc. p. 474. Doorga Prasad Mytee vs. Joynarain Hazrah.

## MADRAS HIGH COURT.

*Penal Code, sec. 430—Causing a diminution of water-supply—Definition of offence of causing such.*

*Held* by the majority of a Full Bench, INNES, J., dissenting; that it is not part of the definition of the offence of causing a diminution of water-supply for agricultural purposes that the act of the accused should be a mere wanton act of waste. It is sufficient that the act is done without any show of right.

*Vide* I. L. R., 1 Mad., p. 262. Ramakrishna Chetti vs. Palaniyandi Kudambar.

*Limitation—Act IX. of 1871, sec. 21—Payment of Interest.*

The exception of payment of interest contained in sec. 21, Act IX. of 1871, is not confined to payments made after that Act came into force, but applies also payments made before that date.

*Vide* I. L. R., 1 Mad. p. 264. Teagaraya Mudali vs. Marappā Pillai.

*Village Accountant—Village Munsif's Peon—Indian Penal Code, section 217—Direction of law—Criminal Procedure Code, section 90.*

Where a Village Accountant and a Village Munsif's Peon had been convicted under section 217 of the Indian Penal Code of having disobeyed the direction of law contained in section 90 of the Criminal Procedure Code,—

*Held* that they were wrongfully convicted as not bearing the character which raises the obligation under the latter section.

The direction of law mentioned in section 217, Indian Penal Code, means a positive direction of law such as those contained in sections 89 and 90 of the Criminal Procedure Code, and cannot be made to extend to the more general obligation on every subject not stifle a criminal charge.

*Vide* I. L. R., 1 Mad. p. 266. Raminih Nayar, *Petitioner*.

## BOMBAY HIGH COURT.

*Talabda Koli caste—Adoption—Hindu Law—Contract to settle—Specific performance—Alienation of immoveable property by Hindu widow—Limitation.*

It is not a necessary consequence of the circumstance that the spiritual motive for adoption, which exists amongst the higher castes of Hin-

thus, has no influence upon the Talabda Koli caste, that its members may not lawfully adopt.

Where a member of the Talabda Koli caste of Hindus, by an express promise to settle his property upon the boy, induced the parents of the defendant to give him their son in adoption, but died without having executed such settlement,

*Held* that the equity to compel the heir and legal representative of the adoptive father specifically to perform his contract, survived; and the property in the hands of his widow was bound by that contract.

Therefore, when the widow of the adoptive father, nearly thirty years after his death, gave effect to his undertaking by executing a deed of gift of his property in her hands in favour of the adopted son,

*Held* that such alienation was valid as against the next heir by blood of the adoptive father, and he could not, on the death of the widow, avail himself of the plea of limitation which she had waived.

The nature of a Hindu widow's estate in immoveable property considered.

*Vide* I. L. R., 2, Bom. p. 67. *Bhala Nahana vs. Parbhu Hari.*

*Parsis—Distribution—Advancement—Statute of Distribution (22 and 23, Car. II., C. 10) Section 5—Indian Succession Act (X. of 1865), Section 42—Parsi Succession Act (XXI. of 1865), Section 8—Administration—Limitation—Liability of the share of one of the next of kin for a debt due by him to the intestate, but barred at the date of the death of the latter—Cause of action—Claim against estate of intestate on account of moneys paid after his death for the surviving members of his family—Married woman—Separate property.*

In excluding by Section 8 of the Parsi Succession Act, from application to Parsis, Section 42 of the Indian Succession Act, which repeals the English rule as to advancement contained in the Statute of Distribution, Section 5, it was not the intention of the Legislature to preserve the last-mentioned rule in force for the Parsi community.

*Semble* that the rule followed by the Courts of Equity in England, whereby, notwithstanding the provisions of the Statutes of Limitation, the share of one of the next of kin in the estate of an intestate, while in the hands of the administrator, is liable for a debt due by the next of kin to the deceased, though barred at the date of the death of the lat-



ter, is to be applied in the Courts of British India. The rule laid down in *Graham v. Londonderry* (3 Atk. 393,) with regard to a husband's rights over ornaments, given to his wife by her father, applied to Parsis.

*Vide* I. L. R., 2, Bom. p. 75. *Dhanjibhai Bomanji Gugrat, vs. Navazbai.*

*Jurisdiction—Court of Small Causes (Bombay)—Suit for possession of immoveable property of a value greater than Rs. 500 and less than Rs. 1,000—Act IX. of 1850—Act XXVI. of 1864.*

The effect of Section 2 of Act XXVI. of 1864 is to extend the compulsory jurisdiction of the Courts of Small Causes in the presidency towns, in suits to recover property, to cases where the value of the property does not exceed Rs. 1,000.

The Court of Small Causes at Bombay has, therefore, jurisdiction to try a suit for the possession of immoveable property of a value greater than Rs. 500 and less than Rs. 1,000.

*Sreemutty Shibosoondary Dossee v. Taracknath Pandit* (2 Ind. Jur. 145, note) dissented from.

*Vide* I. L. R., 2, Bom. p. 84. *Walji Karimji vs. Jagannath Premji.*

*Jurisdiction—Bombay Court of Small Causes—Title to immoveable property—Form of Suit—Practice—Leave to amend Summons—Act IX. of 1850—XXVI. of 1864.*

In a suit brought under Section 91 of Act IX. of 1850, the Bombay Court of Small Causes has no jurisdiction to try a question of adverse title to the immoveable property, the subject of the suit. *Aliter* if the suit be brought under Section 25 of Act IX. of 1850, as extended by Section 2 of Act XXVI. of 1864, and the value of the property in dispute do not exceed Rs. 1,000.

In a case involving a question of adverse title the plaintiff should be allowed to amend the summons issued under Section 91 of Act IX. of 1850, so as to render it conformable with a claim under Section 25 of Act XXVI. of 1864, if the summons were issued in the mistaken form by the fault of the Clerk of the Court, and not of the plaintiff.

*Vide* I. L. R., 2, Bom. p. 91.—*Nowla Ooma vs. Bala Dhurmasi.*

## ALLAHABAD HIGH COURT.

*Acknowledgment of subsisting right—Act XIV. of 1859, s. 1, cl. 15—Act IX. of 1871, sch. ii., art. 148—Limitation—Mortgage—Mortgagee—Suit for redemption—Onus probandi—Unnecessary proof of mortgage where acknowledgment was made prior to 1859.*

In a suit for redemption of landed property the plaintiffs, representatives of the mortgagors, relied on an acknowledgment of the mortgagors' title contained in an entry in the settlement records of the year 1841 which was attested by the representatives of the mortgagees, defendants in the suit; and the lower Courts having differed as to whether the acknowledgment was sufficient without proof that it was made within sixty years from date of the alleged mortgage, *held*, that inasmuch as there was no limitation to suits for redemption of mortgage of landed property prior to Act XIV. of 1859, it was unnecessary to ascertain when the mortgage was effected, the acknowledgment of 1841 being an acknowledgment of a right still subsisting, and one which fulfilled the requirements of art. 148, sch. ii., Act IX. of 1871.

*Vide I. L. R., 1, All. p. 425.—Daia Chand vs. Sarfraz Ali.*

*Act IX. of 1861, ss. 1, 6—Fresh application—Guardian—Minor—Power to appoint—Previous orders not conclusive.*

A Court is not precluded from entertaining a fresh application for the guardianship of a minor under s. 1 of Act IX. of 1861, by the circumstance that a previous application of the same sort has been refused.

*Vide I. L. R., 1, All. p. 428.—Nehalo vs. Nawal.*

*Hindu Law—Destruction of character of joint undivided family property by introduction of stranger in blood as auction-purchaser—Assent of co-parceners no longer necessary to constitute valid gift.*

The introduction of a stranger in blood, as auction-purchaser of a portion of the rights and interests of an undivided Hindu family, breaks up the constitution of such family as undivided, and destroys the character of such property as joint and undivided family property : and a gift subsequently made by the remaining members of the original undivided Hindu family of their rights to a third person, without the assent of the

auction-purchaser, is not invalid by reason of the principle of Hindu law which requires the assent of co-parceners in an undivided Hindu family, to give validity to such a gift.

*Vide* I. L. R. 1, All. p. 429.—Ballabh Das vs. Sunder Das.

*Act VIII. of 1859, ss. 5, 13—Account of sums realized on collective mortgage of lands in separate districts—Decree for redemption of lands within jurisdiction not barred by Regulation VII. of 1825, because based on such account.*

In a suit for redemption of lands lying within the district of Mirzapur, but included in the same mortgage with other lands lying within the domains of the Maharaja of Benares, the Subordinate Judge of Mirzapur took an account of the sums realized by the mortgagee from all the lands mortgaged, and finding that these sums were sufficient to discharge the entire mortgage-debt, gave the plaintiff the decree sought; the lower appellate Court dismissed the suit on the ground that such account could not be taken without deciding questions lying *ultra vires* of the Mirzapur Court. *Held* that the Mirzapur Court might take such account for the purpose of deciding whether the entire mortgage-debt had been satisfied, and might give the plaintiff a decree for the redemption of the property lying within the local limits of its jurisdiction notwithstanding that in doing so it would have incidentally to determine questions relating to lands lying within the domains of the Maharaja.

*Vide* I. L. R. 1, All. p. 431.—Girdhari vs. Sheoraj.

---

# INDEX.

---

Page.

## A

### ACCOUNT.

By the words "Accounts stated" in Art. 62 of the Limitation Act, is not meant an account settled and signed by the party to be held liable, but simply an account which is stated,

ACCOUNT in a suit for redemption, ... ..	16
ACCOUNTANT, Village, ... ..	44
ACCOUNTANT, Village, ... ..	40
ACKNOWLEDGMENT of subsisting right, ... ..	43
ACQUISITION. <i>See</i> Right of Occupancy.	

### ACTS:—

1850—IX. ... ..	42
1859—VIII., s. 2. <i>See</i> Res Judicata.	
"    "    s. 5, ... ..	44
"    "    s. 73, ... ..	39
XIV., s. 1, cl. 15, ... ..	43
1861—XI. s. 6, ... ..	39
IX. ss. 1, 6, ... ..	43
XXIII. s. 27, ... ..	39
1864—XXVI., . ... ..	42
1865—X., sec. 42, ... ..	41
"    XXI., sec. 8, ... ..	41
1869—VIII., s. 18, ... ..	39
1871—IX., ss. 20, 21 ; Sch. II. Arts. 167, 169, ... ..	38
"    "    s. 21, ... ..	40
"    "    Sch. ii., Art. 148, ... ..	43
1872—IX., s. 15 and s. 72— <i>Vide</i> Voluntary Payment.	
1877—IV., s. 41, ... ..	38
ADDING parties, ... ..	39
ADMINISTRATION, ... ..	41
ADOPTION, ... ..	40
ADVANCEMENT, ... ..	41
ALIENATION of immoveable property by Hindu Widow, ... ..	40
AMENDING Pleint, ... ..	39
APPEAL, ... ..	38

	B	Page.
BAR, instances of the intrepidity of the, ...	...	1
BOMBAY Court of Small Causes, ...	...	42
	C	
CAUSE of action, ...	...	41
CAUSING a diminution of Water-supply, ...	...	40
CIVIL Procedure Code, s. 73, ...	...	39
CLAIM against estate of an intestate on account of moneys paid after his death for the surviving members of his family,...	...	41
CLAIM under Rs. 500, ...	...	39
CONTRACT to settle, ...	...	40
CO-SHARERS, ...	...	39
CRIMINAL Procedure Code, s. 90, ...	...	40
	D	
DEFINITION of offence of causing diminution of Water-supply, ...	...	40
DIRECTION of law, ...	...	40
DISTRIBUTION, ...	...	41
	E	
ENHANCEMENT of rent, ...	...	39
EXECUTION. <i>See</i> Mitakshara.		
EXECUTION Proceedings, ...	...	38
	F	
FORM of suit, ...	...	42
	G	
GIFT, ...	...	43
GUARDIAN, ...	...	43
	H	
HIGH COURT, jurisdiction of, ...	...	39
HINDU family, undivided, ...	...	43
HINDU LAW, ...	...	40, 43
HOLDER. <i>See</i> Right of Occupancy.		
	I	
IJARADAR, ...	...	39
INDIAN SUCCESSION ACT. <i>See</i> Act X. of 1865,		
INTERVENOR. <i>See</i> Res Judicata.		
INTREPIDITY of the Bar, instances of the, ...	...	1
	J	
JOINT Estate. <i>See</i> Mitakshara.		
JURISDICTION, ...	...	39, 42, 44

L

Page.

LEAVE to amend Summons, ...	42
LIABILITY of the share of one of the next of kin for a debt due by him to the intestate, but barred at the date of the death of the latter, ...	41
LIMITATION. ( <i>See</i> Account). ..	38, 40, 41, 43

M

MARRIED Woman, ...	41
MINOR, ...	43
MITAKSHARA.	

The rights and proprietary and mokurruri title and share of a Hindu father in the joint family estate under Mitakshara law having been seized and sold in execution of a decree against him, possession of the whole estate was delivered to the Appellant as purchaser.

In a suit by the Respondent, the son of the judgment debtor, to recover the same on the ground that it could not be sold in execution without proof of legal necessity for the debt :—

*Held*, assuming that a member of a Mitakshara joint family may not dispose of his share in the joint estate by voluntary conveyance without the concurrence of his coparceners, that the Appellant, as purchaser at an execution sale of such share, was entitled to ascertain the same by such partition as the judgment debtor might have compelled before the alienation of his share took place, ...

MORTGAGE, Lecture on Simple, ...	31
MORTGAGE, redemption of, ...	17
„ proof of, ...	43, 44
„ proof of, ...	43

O

OCCUPANCY. *See* Right of Occupancy.

ONUS PROBANDI, ...	43
--------------------	----

P

PARSIS, ...	41
PARSI SUCCESSION ACT. ( <i>See</i> Act XXI. of 1865, sec. 8.)	
PAYMENT. <i>See</i> Voluntary Payment.	
PAYMENT of interest, ...	40
PENAL CODE, section 217, ...	40
„ „ section 430, ...	40
„ „ Principles of.—Chapter on General exceptions, ...	25
PRACTICE, ...	42
PRESIDENCY Magistrate's Act, ...	38
PRINCIPLES of the Penal Code, ...	25
PROSECUTION, ...	38
PURCHASER. <i>See</i> Mitakshara.	

	Q	Page.
QUESTION of title, ...	...	39
	R.	
REDEMPTION of mortgage, ...	...	43, 44
REGULATION VII. of 1825, ...	...	44
RENT, enhancement of, ...	...	39
RES-JUDICATA.		

A suit is barred under Section 2 of Act VIII. of 1859, if the right and title which is the subject of the present claim, was substantially in issue and determined between the same parties in a former suit, although the plaintiff in the one case may be the defendant in the other. *Held* also, that if in a rent suit a third party chose to intervene and raise a question of title as between himself and the plaintiff, he must be bound by the decision in that suit, and he cannot raise the same question again in a subsequent suit, ... 22

#### RIGHT OF OCCUPANCY.

A ryot who holds land for twelve years and pays the rent payable on account of the same, acquires a right of occupancy although the person under whom he holds has only a limited, and not a hereditary, interest, 15

RIGHT OF PURCHASER. *See* Mitakshara.

#### S

SALE. *See* Mitakshara.

SHARE. *See* Mitakshara.

SEPARATE PROPERTY, ...	...	41
SIMPLE MORTGAGE, ...	...	17
SMALL CAUSE COURT, ...	...	39
SPECIAL APPEAL, ...	...	39
SPECIFIC PERFORMANCE, ...	...	40
STATUTE of distribution (22 and 23, Car. O. 10, sec. 5.)	...	41
SUIT for possession of immoveable property of a value greater than Rs. 500 and less than Rs. 1,000, ...	...	42

#### T

TALABDA Koli Caste, ...	...	40
TITLE, question of, ...	...	39
„ to immoveable property, ...	...	42

#### U

UNDIVIDED Hindu Family, ...	...	43
-----------------------------	-----	----

#### V

VILLAGE Accountant, ...	...	40
VILLAGE Munsif's Peon, ...	...	40

#### VOLUNTARY PAYMENT.

Money paid into Court to be paid to the decree-holder in order to stay a sale in execution, although with an intimation, to bring a suit to contest the decree-holder's right to attach and sell the property, is, upon a true construction of Sections 72 and 15 of the Contract Act, a voluntary payment and cannot be recovered back, ... 1

# INDEX.

	<i>Page.</i>
<b>A</b>	
ACCOUNT of profits, ...	85
ACTS :—	
1843—XIX., ...	47
1858—XL, s. 18, ...	66
1859—VIII., s. 2, ...	66, 84
" XV., s. 22, ...	85
1861—XXIII s. 27, ...	88
1865—I., Bom., s. 32 ...	87
1866—XX., s. 50, ...	47
1869—VIII.—(B. C) ...	85
1871—VIII., ss. 17, 49, ...	88
1871—IX., s. 22, ...	85
" " sch. ii. arts. 11, 118 ...	85
1872—I., s. 91, (e) ...	88
1872—X., s. 518, ...	85
ADDED PARTIES, suit barred, ...	85
by limitation as to, ...	85
ADMINISTRATOR-GENERAL, ...	86
AMENDMENT of Plaint, ...	83
ANCESTRAL estate, son's interest, ...	83
in, under Mitakshara, ...	83
" Property, ...	87
joint and undivided, ...	87
AUCTION-PURCHASER, rights of—subject to lease, ...	87
<b>B</b>	
BALANCE order, ...	86
BARRED Debt, ...	85
BENGAL Regulation XVII. of 1806, ...	50
BENGAL ACT VIII. of 1869, s. 29, ...	85
BURDEN of proof, ...	83
<b>C</b>	
CAUSE of action. ...	86
" joinder of, ...	88
CESSES, ...	88
CHARGE on immoveable property, ...	87
CLIENT, ...	45
COLLECTION of salt earth, ...	86
COMPANY, ...	86
CONSIDERATION, ...	80
CONTRIBUTORY, ...	86
CO-SHARERS, ...	85
CRIMINAL Procedure Code, (Act X. of 1872) s. 309, ...	86
CUSTOM, immemorial, ...	87
" proof of, ...	87



	D	Page.
DAMAGES, ...	...	85
DEED OF ASSIGNMENT OF MORTGAGE.		
A deed of assignment for a consideration of less than Rs. 100, of a mortgage for a consideration of Rs. 100, or upwards, does not need registration.		
<i>Vasudev v. Rama</i> (11 Bom. H. C. Rep. 149) and <i>Rohinee Debia v. Shib Chunder Chatterjee</i> (15 Calc. W. R. 558, Civ. Rul.) followed,	...	80
DESCRIPTION, ...	...	86
DESHMUKH, ...	...	83
DOCUMENTARY evidence, ...	...	87
	E	
ENHANCEMENT of rent, suit for, ...	...	85
EVIDENCE, ...	...	86
EVIDENCE ACT, ...	...	88
" parol, ...	...	87, 88
" documentary, ...	...	87
" Partition, ...	...	87
EXCLUSIVE privilege, ...	...	85
	F	
FUDAL system, ...	...	87
	H	
HINDU LAW, ...	...	83, 87
	I	
IMMEMORIAL Custom, ...	...	87
IMMOVEABLE property, charge on, ...	...	88
INDIAN PENAL CODE, s. 160, ...	...	86
	J	
JOINDER of causes of action, ...	...	88
JOINT and undivided ancestral property, ...	...	87
JURISDICTION, ...	...	83
	L	
LEASE, right of auction-purchaser subject to, ...	...	87
LEGALITY of sentence, ...	...	86
LIMITATION, ...	...	84
Act IV. of 1821, sch. ii., art. 11, 118, ...	...	85
LIST of Contributories, ...	...	86
	M	
MADRAS Regulation I. of 1805, s. 18, ...	...	86
MANORIAL dues, ...	...	87
MITAKSHARA, ...	...	83
MONEY-DECREE.		
The purchaser of a single money decree passed on a bond hypothecating property does not merely by his purchase acquire a lien upon the property, ...	...	81
MORTGAGE. ( <i>Vide</i> Law of Mortgage, p. 50.)		
A mortgage deed registered under Act XX. of 1866 is not thereby entitled to priority over a mortgage deed which might have been, but was not, registered under Act XIX. of 1843, in cases where the consideration for the rival deeds exceeds Rs. 100. <i>Maleshappa, v. Bas-</i>		

*sappa* (1 Bom. H. C. Rep. 10). *Harnamgir v. Spiers* (2 Bom. H. C. Rep. 204), and *Parabhudas v. Dhondu* (2 Bom. H. C. Rep. 222) distinguished.

*Quere.*—Whether in the case of instruments executed for a consideration less than Rs. 100, Sec. 50 of Act XX. of 1866 would operate to give priority to the deed registered under that Act over the deed which might have been, "but was not, registered under Act XIX. of 1843, ... .. 47

A mortgage of the property of a minor made by the Administrator appointed under Act XL. of 1858, is invalid, unless the sanction of the Court has been previously obtained under s. 18 of the Act.

• Where the administrator was sued, as representing the minor, by the mortgagee, and made no defence to the suit, and the property was sold under a decree so obtained to the mortgagee, by whom it was again sold to a third person, who knew that the administrator had executed the mortgage in that capacity,—*held*, that the decree did not protect the mortgagee who purchased at the Court sale, nor her vendee, from suit by the minor for recovery of the property, ... .. 65

N

Non-JOINDER of parties, ... .. 85

O

OBLIGATION to payment, ... .. 84

P

PAROL evidence, ... .. 87, 88

PARTIES, non-joinder of, ... .. 85

PARTITION, evidence of, ... .. 87

PAYMENT, ... .. 85

PAYMENT, obligation to, ... .. 84

PENAL CODE.

" " Principles of.—Chapter on General Exceptions, ... .. 73

PENSIONS ACT, 1871, ... .. 83

PLEADER.

Where a pleader was struck off the rolls on the ground of his complicity in certain frauds supposed to have been committed by his client and it subsequently happened that his client was acquitted of the charge of fraud *Held* that the pleader cannot have been an accomplice in frauds which must be taken never to have been perpetrated, ... .. 45

PROFITS, ... .. 87

PROFITS, account of, ... .. 85

PROOF, burden of, ... .. 83

R

RECEIPT, unregistered, ... .. 88

REGISTRATION ACT, ss. 17, 49 ... .. 88

REGULATION I. of 1805, Madras, ... .. 86

REGULATION XVII. of 1806, Bengal, ... .. 50

RENT, suit for enhancement of, ... .. 85

REGISTRATION, ... .. 47, 80

RES-JUDICATA, ... .. 47, 84

RIGHT to free pasturage, ... .. 87

## S

**SALE** convertible into a Mortgage.

Where a deed, which on the face of it was described as a mortgage, stated that the grantee was already in possession under a previous mortgage by the grantor, and was under the second deed to receive the profits in liquidation of interest so far as they would go, and that the grantor was not to be liable to repay the principal money or such balance of interest (if any) as might accrue upon it, unless he adopted a son, and the grantee, unless that event happened, was to enjoy the property conveyed in right of purchase for the sum (principal and interest) due to him,

<i>Held</i> that the deed was a sale, liable to be converted into a mortgage, and not a mortgage liable to be converted into a sale, ...	77
SALT-EARTH, collection of, ...	86
SENTENCE, legality of, ...	86
SHARES, definement of, ...	87
SMALL CAUSE COURT SUITS, ...	88
SON's interest in ancestral estate under Mitakshara law, ...	83
SPECIFIC sum of money, suit for, ...	84
SUIT barred by limitation as to added parties, ...	85
„ for enhancement, ...	85
„ for specific sum of money, ...	84

## U

UNREGISTERED RECEIPT, ...	88
---------------------------	----

## PRIVY COUNCIL.

*The 28th April, 1877.*

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith and Sir R. P. Collier.

*On Appeal from Calcutta High Court.*

IN THE MATTER OF ANADAR, *Petitioner.*

*Pleader—Complicity in Fraud by Client.*

Where a pleader was struck off the rolls on the ground of his complicity in certain frauds supposed to have been committed by his client and it subsequently happened that his client was acquitted of the charge of fraud, *Held* that the pleader cannot have been an accomplice in frauds which must be taken never to have been perpetrated.

This is an application on the part of Anadar Dass, late a pleader admitted on the rolls of the High Court, but practising in one of the Courts of Assam, for leave to appeal against an order of the High Court, which struck him off the rolls. Their Lordships are of opinion that the provisions of Act 20 of 1865 afford no ground for granting leave to appeal; the Court had clear jurisdiction under the 14th Section of that Act, to suspend or dismiss the applicant as one who had been convicted of a criminal offence; and was not bound, in the circumstances, to adopt the procedure indicated by the 15th Section. Their Lordships, however, looking at the merits of the case, have come to the conclusion that there might be good grounds for considering upon appeal whether the sentence had not been too severe, and also that there are further grounds for doubting whether if the Court which passed that sentence had then known what had since been made clear, it would have passed so heavy a sentence.

The applicant was convicted of the offence of abetting the secretion of documents which might have been material in the determination of the charge then about to be brought, if not actually pending, against his client.

It seems from the records before their Lordships that he pleaded guilty to that charge; but if that were not so, the conviction would have been justified by his admission of the letter to his client, which their Lordships cannot but regard as an extremely improper letter for a professional man to have written, and by the other evidence before

\* *Vide* Law Reporter, p. 56 to 57.

the Judge. Against that conviction he never appealed. Therefore their Lordships are not in a position to say that there was not a case against the applicant which justified that, a severe punishment. But their Lordships observe that the proceedings came before the High Court in this way: the conviction was forwarded to the High Court with a suggestion on the part of the Deputy Commissioner who had tried the case, in which his superior officer the commissioner concurred, that the applicant should be suspended for one year only. Thereupon the High Court issued the rule to show cause why the pleader should not be altogether dismissed. Their Lordships have before them the judgment delivered when that rule was made absolute; and from that it appears that the Court proceeded not only upon the conviction for the particular offence, but upon an assumption of that which is wholly independent of that offence, namely, of the complicity of the applicant in the supposed frauds by his client. There are several passages in the judgment of the learned Chief Justice which show that that assumption and the failure of the party to deny his supposed complicity were operative on the minds of the judges in determining them to proceed so far as to dismiss the pleader altogether, and to strike him off the rolls.

Their Lordships are unable to find in the materials before them any evidence of the supposed complicity of the pleader in the frauds of which his client was accused. But, however that may have been, it now appears that although, when the High Court pronounced its judgment, a charge of fraudulent misappropriation had been brought or was about to be brought against the client (who had previously been acquitted, on technical grounds, of a charge of theft in respect of the same transaction,) he has since been acquitted, on the merits, of any fraudulent misappropriation. It follows, therefore, that the pleader cannot have been an accomplice in frauds which must now be taken never to have been perpetrated. In those circumstances their Lordships would have been disposed to grant leave to appeal. They feel, however, that to do so would certainly involve a heavy expense to the applicant. There are, moreover, great inconveniences in such appeals, in as much as it is objectionable to put the judges in the position of appearing as Respondents or quasi Respondents in the case; and their Lordships conceive that when the High Court itself takes into consideration the final acquittal of the client, it will probably consider that the applicant has been sufficiently punished by suspension during the period which has elapsed since its order; and may, upon a proper application, be disposed to re-admit him. Such a

course is not without precedent in the case of attorneys who have been struck off the roll in the country. Their Lordships therefore suggest that he should make an application in India and that until the result of that application is made known, the present petition for leave to appeal should stand over.

## BOMBAY HIGH COURT.

*The 1st February, 1877.*

Before Sir M. R. Westropp, Knt, Chief Justice, and Mr. Justice Melvill.

KHANDU DUBLADAS\* (Plaintiff) *Appellant*,

*versus*

TARACHAND AMARCHAND (Defendant) *Respondent*.

*Act XIX. of 1843—Act XX. of 1866, Section 50—Registration—Priority—Mortgage—Account—Res judicata—Notice.*

A mortgage deed registered under Act XX. of 1866 is not thereby entitled to priority over a mortgage deed which might have been, but was not, registered under Act XIX. of 1843, in cases where the consideration for the rival deeds exceeds Rs. 100. *Maleshappa, v. Bassappa* (1 Bom. H. C. Rep. 10), *Harnamgir v. Spiers* (2 Bom. H. C. Rep. 204), and *Parabhdas v. Dhondu* (2 Bom. H. C. Rep. 222) distinguished.

*Quere.*—Whether in the case of instruments executed for a consideration less than Rs. 100, Sec. 50 of Act XX. of 1866 would operate to give priority to the deed registered under that Act over the deed which might have been, but was not, registered under Act XIX. of 1843.

This was a special appeal from the decision of H. Batty, Extra Assistant Judge at Dhulia, reversing the decree of the 2nd Class Subordinate Judge at Yawal.

The plaintiff, Khandu, sued to recover possession of a house and site, alleging that these premises had been mortgaged to him by one Raghu Ramji for Rs. 312-8-0 on 26th July 1860; that he had obtained a decree against Raghu on this mortgage, and at a sale in execution of that decree had purchased the property himself on 26th March 1873. The defendant pleaded, among other things, that the property claimed had been mortgaged to him by the same Raghu Ramji on 20th October 1869; that his mortgage had been duly registered, and, therefore, was entitled to prevail over the unregistered

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\* Vide Indian Law Reports, 1, Bom. 574.

mortgage of the plaintiff.\* He also alleged that he had purchased the property on 7th June 1872 in execution of a decree obtained by him against Raghu on the mortgage of 20th October 1869. The Subordinate Judge, after having taken evidence on the issues framed, found both the mortgages to be *bond fide* and for good consideration, held the mortgage of the plaintiff to be entitled to preference, and made a decree in the plaintiff's favour. In appeal the Assistant Judge reversed that decree, and held the defendant's mortgage entitled to priority on the authority of *Maleshappa v. Bassappa*, (1) *Harnamgir v. Spiers*, (2) and *Parabhudas v. Dhondu*. (3)

*Gokuldas Kahandas* for the appellant:—The plaintiff's mortgage was executed when Act XIX. of 1843 was in force, while the defendant's mortgage was executed under Act XX. of 1866. The question of priority, therefore, did not arise in the case.

*Shantaram Narayan* for the respondent.

WESTROPP, C. J.:—The plaintiff's and defendant's mortgages were both for sums exceeding Rs. 100. Act XX. of 1866, under which the defendant's mortgage was registered, makes no provision in such cases for priority of deed of sale or mortgages registered under that Act over deeds of sale or mortgages which might have been, but were not, registered under Act XIX. of 1843. We cannot, therefore, adopt the view taken by the Assistant Judge of the consequence of the non-registration of the plaintiff's mortgage which was executed on the 26th July 1860, and was, therefore, registrable under Act XIX. of 1843, the defendant's mortgage having been executed on the 20th October 1869, and registered under Act XX. of 1866.

The authorities relied upon by the Assistant Judge were cases in which *all* of the conflicting documents were registrable under Act XIX. of 1843, and, therefore, are inapplicable to the present case, in which one of the mortgages only was registrable under that Act, and the other was registrable under Act XX. of 1866. The two latter of those cases—*Harnamgir v. Spiers* and *Parabhudas v. Dhondu*—are (on the question as to the effect of possession) the subject of comment in *Balaram Nemchand v. Appa Dulu*. (4)

(1) 1 Bom. H. C. Rep. 10.

(2) 2 Bom. H. C. Rep., 1st Ed. 213, 2nd Ed. 204.

(3) 2 Bom. H. C. Rep., 2nd Ed. 222.

(4) 9 Bom. H. C. Rep. 121, See pp. 138, 139, and 141.

Whether, in the case of instruments executed for a consideration under Rs. 100, where the earlier document was registrable under Act XIX. of 1843 and the later document was so under Act XX. of 1866, the 50th Section of that Act would give to the later document, if registered, priority over the earlier document, if unregistered, is a question which does not present itself here, and on which we offer no opinion.

The plaintiff, the first mortgagee, is now entitled to recover possession of the house and site, the subject of this suit, and to hold the same as against the defendant, the second mortgagee, and we decree that such possession be forthwith given to the plaintiff; but we will give liberty to the defendant to redeem the same on payment of the sum which may be found now due to the plaintiff upon an account duly taken in respect of the mortgage to him by Raghu, of the 26th July 1860. The decree in the plaintiff's suit (No. 1198 of 1872) against Raghu is not binding upon the defendant, who, though he became a purchaser on the 7th June 1872, was not made a party to that suit, which seems to have been instituted on or about the 17th July in the same year. Therefore the account taken in that suit is not conclusive upon the defendant.

The defendant must, within one calendar month after this decree has been notified to him, inform the subordinate Court whether or not he intends to redeem, and, if so, whether he demands that an account should be taken of what is due to the plaintiff. If he do within that time demand that such account should be taken, the subordinate Court should, within the period of three calendar months from such demand, take and complete such account; and if the defendant do, within three calendar months (from the time the amount found due on such account to the plaintiff is notified by the subordinate Court to the defendant,) pay to the plaintiff that amount and the costs of the suit, and of the regular appeal, the defendant shall be at liberty to redeem and recover the house and site (the subject of this suit) from the plaintiff; but if the defendant do not pay such amount and such costs to the plaintiff within the last-mentioned period of three calendar months, the defendant is to be for ever barred and foreclosed from redeeming the said house and site from the plaintiff. The parties respectively are to bear their own costs of this special appeal.

*Decree reversed.*



## THE LAW OF MORTGAGE.

### BENGAL REGULATION XVII. OF 1806.

*With Notes by C. D. Field, C. S., M. A., L. L. D., Barrister-at-Law, &c.*

**A REGULATION** *for extending to the province of Benares the rates of Interest on future Loans, and provisions relative thereto contained in Regulation XV., 1793; also for a general extension of the period fixed by Regulations I., 1798 and XXXIV., 1803 for the Redemption of Mortgages and Conditional Sales of Land under Deeds of Bai-bil-wafa, Kat-Kabala or other similar designation.—PASSED by the Governor-General in Council on the 11th September 1806.*

**THE** rules prescribed by Regulation I., 1798 for preventing fraud and injustice in conditional sales of land under deeds of *bai-bil-wafa* or other

Preamble.

deeds of the same nature were declared to extend to Benares, as well as to the Provinces of Bengal, Bahár and Orissa, and under the terms of section 2 of that Regulation might be considered from the time of its publication to have established the general limitation of interest at the legal rate of “twelve per cent. per annum.” As however the provisions relative to a limitation of interest contained in Regulation XV., 1793 and re-enacted for the Ceded and Conquered Provinces by Regulation XXXIV., 1803 have never been expressly extended to Benares, and as it appears that the limitation of twelve per cent. per annum has not yet been considered in force within that province, it is necessary that an express rule should be enacted for extending to Benares the same limitation of interest and provisions connected therewith as are in force throughout the other provinces under this Presidency. It is further requisite for the purpose of preventing improvident and injurious transfers of landed property at an inadequate price by the forfeiture of mortgages accompanied with a condition of sale to the mortgagee, if the amount advanced be not repaid

within a stated period (which description of mortgage is common throughout the country under deeds of *bai-bil-wafa*, *kat-kabala*, and other similar designations), that an equitable provision should be made for allowing a redemption of the estate within a reasonable and limited period on payment of the principal sum lent, with interest thereupon if the mortgagee shall not have been put in possession. The Governor-General in Council has accordingly enacted the following rules to be in force from the time of their promulgation in the several provinces therein specified respectively.

II. The provisions contained in the several sections of Regulation XV., 1793 are hereby declared

Provisions of Regulation XV., 1793 extended to Benares from the date herein specified with certain modifications.

to extend to the Province of Benares from the commencement of the ensuing year 1807 A. C. corresponding with the 19th Poos of the Bengal year 1213, and 7th

Poos of the Fussily year 1214—subject to the following modifications.

[This section, in so far as it extends to Benares ss. 4, 6, 7, 8, 9, 10, and 11 of Reg. XV. of 1793, was repealed by s. 1, Act XXVIII. of 1855, which also repeals these sections of Reg. XV. of 1793. The remaining sections of Reg. XV. of 1793 have been repealed by Act VIII. of 1868, save as provided therein. In so far as concerns the extension to Benares of these remaining sections, the above section (2 of Reg. XVII. of 1806) has never been expressly repealed—See note to s. 3, Reg. I. of 1798.]

III. Instead of the limitations of interest specified in

What rates of interest to be decreed by the Courts of Civil Judicature, if the cause of action have arisen before the period stated in the preceding section. Laws and usages of the province, and the spirit of section 9, Regulation VII., 1795 to be applied in certain cases.

sections 2 and 3, Regulation XV., 1793, if the cause of action shall have arisen before the period stated in the preceding section, the Courts of Civil Judicature are to decree whatever rate of interest may have been voluntarily stipulated; or, if interest be payable in any case wherein a specific rate may not have been stipulated, according to the law and usage of the province, in conformity with the

spirit of section 9, Regulation VII., 1795,

which directs with respect to bills of exchange, receipts or notes of hand, that the custom of the country is to be abided by, and with respect to dealings and money transactions amongst *mahajans* and *sarrafs*, that the established customs observed and enforced amongst them are to be adhered to by the Courts in their inquiries and decisions.

#### V. The forfeiture of interest for stipulation of a higher

The forfeiture of principal and interest in the cases herein specified, enacted by section 8, Regulation XV., 1793, not to be considered applicable to *bonâ fide* loans contracted, or bonds executed, previously to the period specified in section 2.

rate than what is authorized, enacted by section 8, Regulation XV., 1793, and the forfeiture of principal and interest in cases of attempts to elude the prescribed rules by deductions from the principal or other devices, provided against by section 9, Regulation XV., 1793, shall not be considered applicable to any loans actually and *bonâ*

*fide* contracted or to any bonds or other instruments voluntarily given for the evidence and security of such loans previously to the period stated in section 2 of this Regulation.

#### VII. In addition to the provisions made in the provinces of

Provisions in addition to those made by Regulations I., 1798, and XXXIV., 1803 for the redemption of mortgages and conditional sales of land under deeds herein specified. What shall entitle the mortgagor or his legal representative to redemption of his property before the final foreclosure of the mortgage, at any time within the period of one year from and after the period of the application made by the mortgagee to the *Zillah* or City Court for foreclosing the mortgage. *Pro-viso.*

Bengal, Bahár, Orissa and Benares by Regulation I., 1798 and in the Ceded and Conquered Provinces by Regulation XXXIV., 1803 for the redemption of mortgages and conditional sales of land under deeds of *bai-bil-wafa*, *kat-kabala* or any similar designation, it is hereby provided that, when the mortgagee may have obtained possession of the land on execution of the mortgage deed, or at any time before a final foreclosure of the mortgage, the payment or established tender of the sum lent under any such deed of mortgage and conditional sale, or of the balance due if any part of the principal

amount shall have been discharged, or when the mortgagee may not have been put in possession of the mortgaged pro-

erty the payment or established tender of the principal sum lent with any interest due thereupon, shall entitle the mortgagor and owner of such property or his legal representative to the redemption of his property before the mortgage is finally foreclosed in the manner provided for by the following section, that is to say, at any time within one year (Bengal, Fuzsily or Willaity, according to the era current where the mortgage may take place) from and after the application of the mortgagee to the *Zillah* or City Court of *Diwāni Adālat* for foreclosing the mortgage and rendering the sale conclusive in conformity with section 8 of this Regulation—provided that such payment or tender be clearly proved to have been made to the lender and mortgagee or his legal representative, or that the amount due be deposited within the time above specified in the *Diwāni Adālat* of the *zillah* or city in which the mortgaged property may be situated, as allowed for the security of the borrower and mortgagor in such cases by section 2, Regulation I., 1798 and section 12, Regulation XXXIV., 1803, the whole of the provisions contained in which sections as applied therein to the stipulated period of redemption are declared to be equally applicable to the extended period of one year granted for an equitable right of redemption by this Regulation.

(If the mortgagee have *not* been put in possession of the mortgaged property, the payment or tender must be of the principal *together with interest*. If on the contrary the mortgagee have obtained possession, payment or tender of the principal only is necessary in order to save the equity of redemption, the interest being left to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession. Where the mortgagees had sued and obtained a decree for possession, but being opposed in the execution of this decree by the *mir-i-peshgidar*: each of the mortgagees had instituted a suit against these for possession of his own share with mesne profits from the date of such suits and had obtained decrees and were admittedly in possession of a portion of the lands—*Held* that, having obtained decrees for possession and *wāsilat* (mesne profits), it was their own fault if they did not execute them and that they were *in possession* within the meaning of the above section, so as to render a deposit of the principal

only sufficient to save the equity of redemption—*Sakriman Dichut and others v. Dharam Nath Tewari and others*, III. B. L. R. Civ. Ap. 141—And see *Abdalla Khan v. Upendra Chandra*, VI. B. L. R. Appen. 53.]

### VIII. Whenever the receiver or holder of a deed of

How a mortgagee or holder of a deed of conditional sale is to proceed, when desirous of foreclosing a mortgage, or rendering a conditional sale conclusive—To present a petition in person or by an authorized *vakil* to the Judge of the *zillah* Court—How the Judge is to proceed on receiving such petition.

mortgage and conditional sale, such as is described in the preamble and preceding sections of this Regulation, may be desirous of foreclosing the mortgage and rendering the sale conclusive on the expiration of the stipulated period or at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition to be

presented by himself or by one of the authorized *vakils* of the Court to the Judge of the *zillah* or city in which the mortgaged land or other property may be situated. The Judge, on receiving such written application, shall cause the mortgagor or his legal representative to be furnished as soon as possible with a copy of it, and shall at the same time notify to him by a *parwana* under his seal and official signature, that, if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification, the mortgage will be finally foreclosed and the conditional sale will become conclusive.

[The foreclosure procedure provided by this section does not apply to the High Court on its Original Side - *Bank of Hindustan, China and Japan v. Nondolal Sen and others*, XI. B. L. R. 301 : nor has it been extended to Madras - *Pattabhiramier v. Vencatarow Naicken*, XIII. Moo. Ind. Ap. 560. When the land is situate in two districts, the application for foreclosure may be made to the Judge of the Court of either district. Service of the copy of the application, together with the Judge's notification on the widow, who had a life-interest with a species of power—viz. a power to appoint an heir by adoption, which heir when appointed would have a right to the inheritance, the widow being his guardian in the interim—was held to be a good and sufficient service - *Rasmani Devya. v. Pran Kissen Das*, IV. Moo. Ind. Ap. 392.

The *parwana* must distinctly notify as required by this section that, if

the mortgaged property be not redeemed within a year, the mortgage will be finally foreclosed and the conditional-sale become conclusive; otherwise there will be no sufficient compliance with the requirements of the Regulation and the foreclosure proceedings will be irregular—*Bhikan Khan v. Bechan Khan*, III. N. W. P. Rep. N. S. 35. A notice signed by a Munserim is not a sufficient compliance with the law, which requires the Judge's official signature—*Seith Hur Lal v. Manick Pal and others*, III. N. W. P. Rep. N. S. 176. Unless a copy of the application accompanies the notice, the proceedings will be irregular and invalid—*Dinonath Ganguli v. Nursingh Persad Dass*, XXII. W. R. 90 : *Santi Ram Jana v. Modu Myti*, XX. W. R. 363.

In *Mokan Lal Sukral v. Golak Chandra Datta* (X. Moo. Ind. Ap. 1, and I W. R. P. C. 19 their Lordships of the Privy Council remarked—"It is quite clear upon the authorities that if the sale "(in execution of a decree)" had taken place before the notice of foreclosure was served, that notice to be effectual must have been served on the purchaser." In *Gurū Persad Jana v. Biprersad Berra, &c.* (1 Mar. 293) the equity of redemption had not been assigned until after the mortgagee had served notice of foreclosure upon the mortgagor, and it was held that the assignee had no ground of complaint in consequence of not having been served with notice. The Court also said—"Nor do we think, if the mortgagor had assigned to the appellant the equity of redemption before the notice of foreclosure there would have been any obligation upon the mortgagee to serve, or any right on the part of the appellant to insist upon service of, such notice upon him." This remark was a mere *obiter dictum* not necessary for the decision of the case. The subsequent cases decide that, if the assignment take place before the service of notice, the mortgagee, if aware of the assignment (and also perhaps if such assignment be not inconsistent with the terms of the original mortgagee) must serve notice upon the assignee—*Kishen Bullab Mahta v. Belasi Kummur, &c.* III. W. R. Civ. Rul. 230 : *Mahoram Misser v. Khagpat Das*, V. R. C. & C. R. Civ. Rul. 334 : *Ganga Gobind Mandal v. Banī Madhub Ghose*, III. B. L. R. Civ. Ap. 172 : *Bhanumoti Chaudarain v. Prem Chand Neogh and another*, XXIII. W. R. 96 : *Sheo Ghulam Singh and others v. Ram Rup Singh and others*, XXIII. W. R. 25, and I. B. L. R. Short Notes iii. A second mortgagee is within the rule and entitled to notice—*Nadigar Chand Chakravartti and others v. Rāp Das Banerji*, XXII. W. R. 475. In *Mahant Jairam Gir v. Raja Krishan Kishore Chind*, V. N. W. P. Rep. Civ. Ap. 307, the High Court of the North-Western Provinces held, that notice having been served before assignment, a fresh notice to the assignee was not necessary, observing—"The requirements of the Regulation were satisfied by the service of the notice on the person who, at the time of the service, was entitled to re-

deem." See also *Bhanumati Chaudhrai v. Premchand Neogi and another*, XV. B. L. R. 28. In the case of a minor, service on the minor and his mother was held sufficient—*Dabi Persad and another v. Man Khan*, IV. N. W. P. Rep. N. S. 444, and see above the case at IV. Moo. Ind. Ap. 392. As to a lunatic, see *The Court of Wards v. Kapalman Singh and another*, X. B. L. R. 364.

As to the *mode of service*, the Regulation does not provide for any mode

#### Mode of Service.

of service in substitution for personal service. It has in some cases been held that personal service is not necessary; but, in order to justify resort to any other mode of service, it ought to be shown that, notwithstanding all reasonable efforts, personal service could not be effected—*Madhu Singh and another v. Mahtab Singh and others*, III. N. W. P. Rep. N. S. 325. Under Reg. XVII. of 1806, a Zillah Judge is judicially required to see that it is *proved* before him *that the notice has been duly served*, and to record a proceeding certifying that all that Reg. XVII. of 1806 requires has been duly carried out. The foreclosure proceedings are therefore *prima facie* proof of service—*Mir Abbas Ali v. Nand Kumar Ghose and others*, VII. W. R. Civ. Rul. 123. In a suit for maintenance of possession by a mortgagee against the purchaser (at a sale in execution of a decree) of the mortgagor's rights, it was held that plaintiff was bound to show by evidence independently of the mere copy of the foreclosure proceedings that the notice was served, as a plaintiff is required to prove his case when a fact alleged by him is challenged by the opposite party—*Sukhman v. Churaman*, I. N. W. P. Rep. Civ. Ap. 172.

With reference to the *costs of the notice*, it was said in *Gangaval Ajakh v.*

#### Costs of Notice.

*Gopal Opadha and others*, II. Sev. 335: "Reg. XVII. of 1806 is silent as to these costs, and therefore, as there is no provision in the mortgage deed relating to them, we think that the plaintiff was not bound to pay them into Court. The applicant also objects that the plaintiff is wrong in claiming to deduct interest on the sums paid into Court. We think this argument is well founded, because the defendant had not the money, and could not venture to take it out of Court without peril to his security."

In the case of *Mahesh Chandra Sen v. Tarini* (I. B. L. R. F. B. 14), it

was finally settled by a Full Bench of the Calcutta High Court that the 'one year from the date of the notification' is to be calculated from the date of the notice (excluding the day of service) and not from the date of the notification or date of issue of the notification, as formerly ruled by the Sadr Court.—See also *Sarup Chandra Nag v. Bonomali Pandit* (9 W. R. Civ.

Rul. 116; V. R. C. & C. R. Civ. Rul. 63), in which it was remarked that 'the application of the mortgagee' in s. 7 of this Regulation must mean the whole transaction contemplated in s. 8, ending with the notification to the mortgagor. The rule in the North-West Provinces is still to reckon from the issue and not from the service of the notice—*Ghazi-udin v. Bhakun Dholi*, III. N. W. P. Rep. Civ. Ap. 301. The mortgagee caused a second notice to be served on the mortgagor, especially asking that such second notice should run from the date of the first notice. More than a year from the service of the first notice, but less than a year from the service of the second notice, foreclosure took place. It was contended for the mortgagor that he was entitled to count the year of grace from the date of the second notice, but the High Court held this contention untenable, regarding the second notice not as a fresh notice, but as a re-service of the first notice for greater caution—III. N. W. P. Rep. Civ. Ap. 187. The Civil Court was closed on account of a regular holiday on the day on which the year of grace expired. Held that it was not sufficient to make the deposit on the first day on which the Court opened, that it was the business of the mortgagor to have come before the holiday, as he might have known thereof, the authorized holidays of the Civil Courts being always duly notified beforehand—*Kamala Kant Meiti v. Srimati Naraini Dasi and others*, IX. W. R. Civ. Rul. 583, V. R. C. and C. R. Civ. Rul. 337. From this case must be distinguished *Dabi Rawut and another v. Hiramun Mahatun and others* (VIII. W. R. Civ. Rul. 223 and IV. R. C. and C. R. Civ. Rul. 157), in which the day for payment had been extended by consent of parties, and on the last day so fixed the Court was closed, not for an authorized holiday, but improperly and without authority. The deposit here made on the first open day was held to be sufficient. Foreclosure cannot be applied for before the expiry of the "stipulated period" or period prescribed by the mortgage contract for the performance of its conditions; and proceedings taken before such expiry are wholly inoperative—*Sarasibala Debi and another v. Nand Lal Sen*, V. B. L. R. 389.

A mortgaged by *bai-bil-wafa* or *kat-kabala* certain property to B. A long litigation subsequently took place as to the property between parties who claimed it by gift and by heirship, and one C., who claimed under an alleged sale by A. In this litigation B. intervened for the purpose of protecting his own interests, and the several decrees which were passed were expressed to be without prejudice to B's claims as mortgagee. Finally the claims of all other parties against C were dismissed. B thereupon, contending that a foreclosure of the title to redeem had duly taken place, brought against C and others the usual suit for possession in order to perfect in himself the proprietary right to the lands free from redemption. This suit was brought more than twelve years after the time fixed for payment of the money in the mortgage deed. C con-



tended that under S. 14 of Reg. III. of 1793, B was barred by limitation ; also that the right to foreclose had been defeated by a due deposit of the mortgage money. Although S. 14, Reg. III. of 1793 has been repealed, and the decision on the first point, so far as regards its particular application to this section, is now of little importance, yet, as the remarks of Privy Council have also a general application to similar enactments and to the rights of mortgagors and mortgagees as affected by limitation, a brief notice of these remarks will be useful. Their Lordships observed that, in considering the effect on a plaintiff's suit of a legislative bar created by general words, it is often important to regard the nature and object of the suit, the nature of the title to which the bar is set up, who the parties are who raise the objection, and against whom it is raised : that the bar from a twelve years' possession under those Regulations did not depend simply on the length of possession, it might exist in favor of one occupant and not of another, might be powerful against one demand or one sort of claim and be at the same time inoperative as against others. The time might run from a date prior or subsequent to the plaintiff's title to possession. A cause of action is not prolonged by mere transfer of title. It cannot therefore be laid down as a rule universally true under the section in question that a mortgagee's proceeding for a foreclosure under a mortgage of the class of *bai-bul-wanfâ* simply cannot be preferred after twelve years from the expiration of the time which the instrument fixes as the period of redemption by payment, and on the expiration of which the conditional sale will become absolute, for this indiscriminating ground of decision would include alike adverse occupations and those which had not the semblance even of such a character, and would establish a bar arising from simple occupation, and not from the laches of the demandant or others before him. That, if the transaction were viewed as it should be under the Regulations, *viz.* one of mortgage redeemable at any time by the mortgagor or those claiming under him, then, as no difference between the law of India and that of England as to the relations between mortgagor and mortgagee on this point had been suggested to their Lordships, the possession of those who claim under the mortgagor, so long as they assert a title to redeem and advance no other title inconsistent with it, must *prima facie* at least be treated as perfectly reconcilable with and not adverse to the title of the mortgagee. Their Lordships were unable to find in the particular case anything to support an inference that the once undoubted right of the mortgagee to enforce possession was at an end or barred or incomplete. His intervention in the previous litigation—the decrees made therein showed the contrary, and they therefore decided that he was not barred. With respect to the second objection, *viz.* that B had refused a valid tender of the money, it appeared that C had lodged the money in Court, petitioning that

it might be paid out to B, but had in his petition disputed the validity of B's title to foreclose and expressed an intention, amounting to a notice, of suing B to recover back the very money he was tendering. The Privy Coun-

Deposit must be unconditional.

cil held C's tender made in this manner insufficient to satisfy the law, remarking that the meaning of the direction that the " money be paid into Court clearly is that the mortgagor may have adequate and lasting evidence of that which is put in place of a tender ; and the mortgagee, the security and advantage of a deposit in acknowledgment of the title. The mortgagee would have little inducement to take the money, waiving his lien by its acceptance, if litigation on the very same subject were to recommence upon his acceptance of the money." But independently of this objection there was another and a graver reason for holding the payment not to be such a payment as the Regulations contemplate. C's title to redeem was neither proved nor admitted. A grave suspicion rested on the purchase which he alleged he had made under the option given him by A. The acceptance of C's money would have been an admission by B of a title to redeem in which he was not bound to acquiesce. This title not having been proved, B's refusal must be viewed in the same light as if the money had been tendered by one who had no title to redeem the mortgage, and who did not offer it with due consent in the name of the heir of the mortgagee. It was urged that B had served notice on C and was by this estopped, but their Lordships decided otherwise, remarking—"The mortgagee cannot tell the exact nature of an occupant's title in all cases, nor how far he may be entitled with the mortgagor's consent to tender in his name. It is best to have a general rule, and service on the occupant is calculated to prevent errors."—*Prannath Rai Chaudhri v. Raim Ruttun Rai and others*, VII. Moo. Ind. Ap. 323. As to the necessity of the deposit being unconditional, see also *Abdur Rahman v. Kishto Lal Ghose*, B. L. R. Sup. Vol. F. B. 598, and VI. W. R. Civ. Rul. 225.

In the case of *Baldin and others v. Mussamat Golab Kunwar and others* (N. W. P. Rep. I. F. B. 102) it was stipulated in the deed of conditional sale that the loan should be repaid in *nineteen* annual instalments from 1846 to 1864, and that, if the instalments for two years were unpaid when a third instalment fell due, the mortgagee should be entitled to foreclose and obtain possession. In 1848 a third instalment fell due, two previous instalments being unpaid. No steps to foreclose were taken till May 1861, when proceedings were commenced and an order of foreclosure was obtained on 11th July 1862, upon which a suit to obtain possession of the property was instituted in January 1866. To this suit limitation was pleaded under cl. 12, s. 1, Act XIV. of 1859, inasmuch as *twelve years* had elapsed since the default in 1848, from which it was contended that the cause of action dated.

The High Court observed that the deed gave the plaintiffs an inchoate and conditional right or interest in the land, which they might convert into a complete and absolute title of ownership; that power of foreclosing, when three annual instalments remained unpaid, was not inconsistent with the right attached by law of foreclosing "on the expiration of the stipulated period" (nineteen years in this case), "or at any time before the sum lent is repaid" (s. 8, Reg XVII. of 1806); that this special stipulation did not express that on such default the whole amount was to become payable, or that foreclosure was to be made then *and not afterwards*. The Court were of opinion that the cause of action arose upon the final foreclosure and that the suit was therefore within time, and expressed their dissent from those cases which decided that, as the mortgagee's cause of action arises on the mortgagor's default, the mortgagee's suit for possession must be instituted within twelve years from the date of default with allowance for the year of grace. Reference was made to the above case of *Prannath Rai Chaudhri*, and it was observed that a default may be made by the mortgagors, which may give the mortgagee a right to sue or to enter into possession (if he chooses to assert such right), but which may notwithstanding have no effect whatsoever in altering the nature of the mortgage title. If, notwithstanding one or more defaults, there is no repudiation of the mortgagee's right, but on the contrary a recognition of it, there is nothing in the law to limit the time within which the mortgagee may foreclose. With reference to certain other issues in this case, it was remanded in order to consider the effect of the whole evidence, and whether it tended to show a possession by the mortgagors for any and what number of years adverse to and inconsistent with the mortgage title which was denied, and as to this it was remarked that it is well settled that foreclosure proceedings under the Regulations give no efficiency to transactions not in themselves valid.

If a mortgagee in possession fraudulently allows the Government revenue to fall into arrears with a view to bringing about a sale of the land and purchasing it himself, he will not by such a purchase be permitted to defeat the equity of redemption—*Nawab Sidhi Nazir Ali Khan v. Ojdharam Khan*, X. Moo. Ind. Ap. 540; see also IV. R. C. & C. R. Civ. Rul. 205, and VIII. W. R. Civ. Rul. 399, where this case will be found in another stage.

In 1850, A and B borrowed Rs. 450 from C, and secured its repayment by a deed of conditional sale of two houses. The deed contained no stipulation for the payment of interest, and the principal was to be payable at the expiration of two years. Nine years after, i. e. in 1859, C foreclosed the mortgage. A and B had never given him possession, nor did he at any time take or sue for possession. In 1862 and 1864 the two houses were sold separately, the mortgagors and the mortgagee being parties to the sales and

assenting to them ; and on each of these sales the zemindars received their *hak-chikaram* or customary due of one-fourth the purchase-money. The zemindars then sued A, B and C for one-fourth of Rs. 759 said to be due on foreclosure, when the conditional sale became absolute. It was found that the zemindars were entitled to the customary due *not only upon ordinary sales, but also upon conditional sales becoming absolute by foreclosure*. It was decided that the zemindar's right is to a share of the purchase-money, not merely to claim that share from the vendor, that it was therefore incumbent on the purchaser, if he would acquit himself of all liability, to see that the zemindars were satisfied in respect of their due and he could not discharge himself by a payment to the vendor, therefore that the zemindars were entitled to a decree against C, as well as against A and B : but that the sum on which the one-fourth should be calculated was, not the amount due at the time of foreclosure, but Rs. 450, the purchase-money under the terms of the conditional sale—*Hira Ram v. Hon'ble Sir Raja Deo Narain Singh and others*, I N. W. P. Rep. F. B. 63.

Certain revenue-free land having been resumed was settled with the mortgagee in possession—*Held* that his possession was not adverse to the plaintiffs, the mortgagors—*Ram Dyal v. Shah Baz Khan and others*, I N. W. P. Rep. 15 ; *Mussamat Omrao Begum v. Mussamat Nizam-un-nissa and others*, I N. W. P. Rep. Civ. Ap. 224.

On the 13th March 1850, A executed an instrument, which on the face of it purported to be an absolute bill of sale of certain land to B in consideration of Rs. 39,500. On the same day B executed to A an agreement, importing that on payment of the sum of Rs. 39,500 with interest at twelve per cent. per annum on 13th March 1851, the sale should be void—the effect of these two instruments, being simply to create a mortgage by *bai-bil-wafa* or conditional sale. By a *third* instrument, dated 12th March 1850, A granted a lease of the same land for three years ostensibly to C, the son of B. Under the terms of this lease C, after discharging the Government revenue and other charges, was to pay to A, his lessor, for the first year of the term Rs. 2,000 ; for the second year Rs. 2,332 ; and for the third year Rs. 2,899. It appeared from the agreement (the second instrument) that A had authorized C to pay B by instalments, out of the rent reserved in the lease, Rs. 2,101 in part satisfaction of Rs. 4,740, being one year's interest on the principal Rs. 39,500, and payable on 13th March 1851. It was not contested that the lease was a *benami* one, B being the real lessee and obtaining possession of the mortgaged premises under colour of this lease. In April 1851, the mortgage-money not having been paid, B commenced proceedings to foreclose, which terminated in his favour on the 31st August 1852. With respect to these proceedings,

taken under Reg. XVII. of 1806, the Privy Council, having set forth what was, in their Lordships' apprehension, the law of foreclosure as established by the Regulations and the practice of the Courts in Bengal, observed as follows :—

“ The general effect of these Regulations is, that if anything be due on the mortgage, and the mortgagor makes an insufficient deposit, and *à fortiori* if he make no deposit at all, the right of redemption is gone at the expiration of the year of grace. *The title of the mortgagee, however, is not even then complete.* It was ruled by the Circular Order of the 22nd July 1813, No. 37, and has ever since been settled law, that the functions of the Judge under Reg. XVII. of 1806, s. 8, are purely ministerial, and that a mortgagee, after having done all that this Regulation requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession or to obtain a declaration of his absolute title if he is in possession. In that suit the mortgagor may contest on any sufficient grounds the validity of the conditional sale or the regularity of the proceedings taken under the Regulation in order to make it absolute. He may also allege and prove, if he can, that nothing is due or that the deposit (if any) which he has made is sufficient to cover

Function of a Judge under the Regulation purely ministerial. Regular suit necessary to complete title by foreclosure.

what is due: but the issue, in so far as the right of redemption is concerned, will be whether anything at the end of the year of grace remained due to the mortgagee, and if so, whether the necessary deposit had been made. If that is found against the mortgagor, the right of redemption is gone.” On the 28th January 1853, B instituted the regular suit above shown to be necessary in order to the completion of his title. In his defence to this suit A pleaded, among other things, that B was bound to render accounts in order that the Court might be satisfied how much was due and from whom. The District Judge having found that B was in possession under colour of the lease, the Sâdr Dîwânî Adâlat held on appeal that B was bound, before he was entitled to have his conditional sale made absolute, to render accounts and to show that the loan had not been liquidated with interest from the usufruct of the property. The case was therefore remanded for the production of the mortgagee's accounts. The Privy Council decided on appeal that, under the above circumstances, the default of the mortgagee in not producing the accounts could not prejudice his right to have the conditional sale made absolute, it being clear that when the foreclosure proceedings were commenced almost the whole of the loan was unpaid. It was observed as follows :—“ The order of remand can be supported only on the principle that in all cases it is imperative on a mortgagee, who has been in possession, to produce his ac-

counts. For this position their Lordships can find no grounds in the Regulations. The words of the third section of Reg. I. of 1798, from which (if at all) an inflexible obligation to produce accounts must be inferred are—"In all instances wherein the lender on a bai-bil-wafá may have been put in possession of the land, and an adjustment of accounts may consequently become necessary between him and the borrower, the lender is to account," &c. Two conditions are expressed, the possession of the mortgages and the necessity of an account. And a comparison of this with the preceding section and with Reg. XVII. of 1806 shows that *that* necessity arises and need only arise, *first*, when the mortgagor has deposited the principal, leaving the question of interest to be settled on an adjustment of the account; *secondly*, when he has deposited all that he admits or alleges to be due; *thirdly*, when he pleads and undertakes to prove that the whole of the principal and interest has been liquidated by the usufruct of the property." Their Lordships having examined the decided cases were of opinion that their authority was in no respect opposed to the above view. The appeal was therefore allowed on the ground that the Court below had erred in dismissing the suit (after B on remand failed to produce the accounts) on the assumption that the production of any accounts was necessary in a case in which there was neither plea nor proof that the usufruct had liquidated principal and interest, and no deposit had been made to cover the balance admitted to be due—*A. J. Forbes v. Amirunissa Begum* X Moo. In. Ap. 340, also I Ind. Jur. N. S. 117. In the case of *Ram Lochun Patuk and others v. Babu Kanhya Lal and others* (VI. W. R. Civ. Rul. 84 and II. R. C. & C. R. Civ. Rul. 94) there was an allegation that the principal and interest had been liquidated by the usufruct of the property and the production of accounts was therefore held necessary, the case being distinguished from *Forbes v. Amirunissa* by this allegation.

With reference to the remark in the above judgment as to the title of the mortgagee not being complete on the termination of the foreclosure proceeding, it will be well to notice two cases decided by the High Court of the North-Western Provinces. In the case of *Khub Chand v. Lila Dhar* (IV. N. W. P. Rep. Civ. Ap. 103) that Court said—"With regard to the first plea, we hold that if the defendants were in possession at the expiry of the year of grace, it was not necessary for them to bring a suit for possession to complete

their title. This is the rule which has been establish-

Is a regular suit necessary, if the mortgagee be in possession?

ed in the case of *Thakur Persad*, 18th June 1862, and in the case of *Tara and others, appellants*, 20th

April 1867. This being so, the limitation period should be computed from the expiry of the year of grace, if the defendants were then in possession." In the case of *Jeorakhun Singh and others v.*

*Hikam Singh and others* (V. N. W. P. Rep. Civ. Ap. 358) the mortgagees had taken the proceedings required by Reg. XVII. of 1806 to make the conditional sale absolute. After the expiry of the year of grace they instituted a suit to obtain possession *with mesne profits from the date at which the foreclosure proceedings terminated*. It was contended that they were not entitled to such profits, as their right to the property had not become

*Mesne profits after the expiry of the year of grace.*

perfect and complete until they had obtained a decree for possession, and in support of this contention the observations of their Lordships of the Privy Council in the above case were referred to. The High Court, after going carefully into the whole question, and referring to the Circular Order above quoted and other similar orders, did not understand their Lordships to rule that the absolute right of the conditional purchaser had not accrued to him at the conclusion of the proceedings taken under the Regulation or that it is not (if these proceedings were regular) to be referred back to that period; but to rule that a conditional purchaser, if out of possession, cannot obtain possession by summary application to the Judge before whom the foreclosure proceedings were held, but that he must proceed by a regular suit; and that in like manner, if he is in possession at the termination of the foreclosure proceedings, and finds it necessary to indicate his title, he must do so by regular suit. A decree for *mesne profits* was therefore given. The entire judgment may well be referred to as being an important one. In the case of *Lutf Hosen and another v. Abdul Ali and others* (VIII. W. R. Civ. Rul. 476) it was decided by the Calcutta High Court that the conditional sale having been duly foreclosed and more than twelve years having elapsed from the expiration of the year of grace, the right of redemption was lost.

The case of *Mohan Lal Sukul v. Goluk Chandra Dutt and others* may be usefully traced through all the stages of a protracted litigation for the purpose of illustrating several points connected with the law of mortgage. By two *zillah* decrees, dated 31st December 1855 and 9th December 1857, the mortgagors were declared entitled to redeem without making any payment, on the ground that the mortgagees in possession had fully paid themselves by receipt of rents and profits. These decrees were in 1859 reversed on appeal by the *Sádr Diwání Adálat* on the ground that the equity of redemption had been barred by foreclosure. The Privy Council decided that none of the above decrees could be supported, remarking that the *Zillah Courts* in coming to their conclusion as to the state of the accounts seemed to have proceeded *not upon proof of the actual collections which were or ought to have been made by the mortgagees*, but upon materials which were in a great measure speculative and conjectural, and that there had been no such trial

of the question of foreclosure as the law (which prescribed the statement of formal issues) and indeed substantial justice required. When the mortgagees filed their notice of foreclosure, they had notice that the interest of the original mortgagor had been taken in execution, and were disputing in a summary suit the decree-holder's right to put up that interest for sale. Their Lordships of the Privy Council observed that under these circumstances notice should have been served upon the decree-holders, it being clear upon the authorities that, if the sale had taken place before notice of foreclosure was filed, such notice to be effectual must have been served upon the purchaser. The case was remanded for a proper trial of the question of foreclosure and for the taking of proper accounts—X. Moo. Ind. Ap. 1. In a subsequent stage the case came before the Calcutta High Court, who observed that *jama-wasil-baki* papers, although they might strongly support the account required by S. 3, Reg. I. of 1798, were not and could not be the account itself, which must be an account setting forth what the mortgagee had realized—from what portions of the mortgaged property—in what terms of periods—with what loss or gain on the several assets—with what necessary reductions—and what remained as the net profits which could be taken as actual realizations towards liquidating the sum due under the mortgaged transactions—V W. R. Civ. Rul. 271. For further discussion as to the accounts to be rendered by the mortgagee, and as to whether redemption can be decreed while there is a balance due, upon payment of such balance, see the same case at IX. W. R. Civ. Rul. 572. The opinion of the senior Judge decided the latter point in the negative.\*

A mortgagor is entitled to an account from the mortgagee even though it be expressly stipulated in the mortgage deed that

Mortgagor entitled to  
Accounts from mortgagee  
in possession.

the latter shall not be liable to account, and a mortgagor (by *zur-i-peshgi* lease) can sue to recover possession of his lands before the expiry of the term fixed by the lease on the ground that the mortgage-debt has been satisfied by the mortgagee's receipts while in possession—*Panjam Singh v. Mussamat Amina Khatun*, VI. W. R. Civ. Rul. 6, and II. B. C. & C. R. 18 (In this case the mortgage contract was entered into before the passing of Act XXVIII. of 1855). In a suit for redemption and mesne profits on the allegation that the mortgagee in possession had collected more than he was entitled to, the mortgagee failed to produce proper accounts.\* Held that the plaintiff, mortgagor, could not succeed without some evidence, but that a small

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\* See also Macpherson on Mortgages, 5th Ed. p. 172, and *Shah Kundan Lall and another v. Susta Koor and another*, VIII. W. R. Civ. Rul. 369 (in this case a conditional decree was given).



amount of legal proof would justify a decree in his favour—*Syud Hashun Ali v. Babu Ramdhari Singh and others*, VII. W. R. Civ. Rul. 82. The mortgagee not having filed proper accounts, it was observed that the accounts put in by the mortgagor, necessarily imperfect and compiled by guess, could not conclude the mortgagor or shift to him a liability placed by the law upon the mortgagee—*Punit Upadhya v. Shah Aminudin*, IV. R. C. & C. R. Civ. Rul. 183.

A conditional sale may, by the agreement and acts of the parties, become absolute without proceedings under the Regulation—*Gurdial and others v. Mussamat Hanskunwar*, II. N. W. P. Rep. Civ. Ap. 176, followed in *Raghonath Dass v. Ram Gopal*. V N. W. P. Rep N. S. 29.

If the mortgagee take away the money deposited by the mortgagor, he will be estopped from suing for possession afterwards on the ground that the money was not deposited until after the expiry of the year of grace—*Khundkar Nawazish Hosen v. Wasalanissa Bibi and others*, VI. B. L. R. Civ. Rul. 249.]

## CALCUTTA HIGH COURT.

*The 2nd June, 1876.*

PRESENT :

Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Ainalie.

DEBI DUTT SAHOO\* (Plaintiff) *Appellant*,

*versus*

SUBODRA BIBEE and others (Defendants) *Respondents*.

*Act XL. of 1858, s. 18—Act VIII. of 1859, ss. 2 and 3—Mortgage by Administrator of a minor's property—Purchaser with notice, Title of—Duties of Purchaser.*

A mortgage of the property of a minor made by the Administrator appointed under Act XL. of 1858, is invalid, unless the sanction of the Court has been previously obtained under s. 18 of the Act.

Where the administrator was sued, as representing the minor, by the mortgagee, and made no defence to the suit, and the property was sold under a decree so obtained to the mortgagee, by whom it was again sold to a third person, who knew that the administrator had executed the mortgage in that capacity,—*held*, that the decree did not protect the mortgagee who purchased at the Court sale, nor her vendee, from suit by the minor for recovery of the property.

\* *Vide* Indian Law Reports, Calcutta Series, p. 288.

The plaintiff in this suit was one of four sons of one Imrit Lall Sahoo, a trader, who died in December, 1863, intestate. The plaintiff being a minor, his brother Rameswar Dutt obtained, under s. 7 of Act XL. of 1858, a certificate of administration of the minor's property. Rameswar Dutt was also appointed guardian of the person of the minor. After the death of Imrit Lall, his sons took possession as his heirs of all his property, and living as a joint Hindu family carried on the business formerly carried on by their father. On the 14th July, 1867 (Asar, 1274) Rameswar Dutt, for himself and the plaintiff, his minor brother, and the other two brothers, Bisseswar Dutt and Purmeswar Dutt, gave a bond for Rs. 37,000 to Subodra Bibee, payable on the 30th Pous. 1275, (February, 1868), in which bond, as a security for the above amount, they pledged Mouzah Dhubolia and a certain warehouse in Mouzah Shamsoodinpur, both which properties belonged to all the four brothers. The consideration set out in the bond was as follows: *1st*, a sum of Rs. 2,500, due on an account current extending from 24th Asin, 1923 S. (18th October, 1866, to date of the bond; *2nd*, of Rs. 27,500, on account of bills discounted by Subodra Bibee, the said bills having been dishonored on presentation in Calcutta; and *3rd*, of the sum of Rs. 7,000, being a loan made by Subodra Bibee to pay certain business debts for which suits were then pending.

No question was raised as to the due execution of the bond, or the existence of the debts therein mentioned: it was admitted that no such sanction of the Civil Court as is provided for by Act XL. of 1858, s. 18, was obtained.

Subodra Bibee in another suit had sued all four brothers on this bond, treating it as a mortgage bond. None of the defendants in that suit appeared, and service of summons upon them having been proved, the suit was treated as undefended, and a decree obtained on the 28th March, 1868, directing a sale of the mortgaged property. The property was, accordingly, put up for sale under the decree, and bought by Subodra herself on the 1st June, 1868, through her gomastah Gopi Lall, who was made a defendant in this suit. On the 16th November, 1870, Subodra sold the purchased property and her outstanding rights under the decree to Mr. Lewis Cosserat, who had already purchased the indigo factory in Mouzah Dhubolia from the four brothers (the plaintiff being represented by his guardian Rameswar Dutt) under a conveyance dated 9th January, 1868.

Debi Dutt having attained majority brought the present suit to re-

cover possession of his share of the property from Mr. Cosserat, upon the ground that it was illegally mortgaged by his brother and guardian, and that, notwithstanding the proceedings and sales which subsequently took place, he had a right to regain possession of his estate.

The Subordinate Judge held, that the suit was not maintainable, on the ground that the plaintiff was, by his guardian, a party to the suit on the bond instituted by Subodra Bibee, and that ss. 2 and 3 Act VIII. of 1859 barred any other remedy than a review of judgment in that suit, especially as the plaintiff did not allege that the bond was a fraudulent one.

From that decision the plaintiff appealed to the High Court.

Mr. R. T. Allan (with him Baboo Moheschunder Chowdry) for the appellant.

Mr. Arathoon (with him Baboo Chunder Madhub Ghose) for the respondents.

The arguments sufficiently appear in the judgment of the Court :—

The following cases were cited :—For the appellant, *Gireewur Singh v. Muddun Lall Doss* (1), *Surut Chunder Chatterjee v. Ashutosh Chatterjee* (2), and *Prosunno Kumari Debya v. Golab Chand* (3). For the respondents, *Hunooman Persaud Panday v. Mussamat Bibooee Munraj Koonweree* (4), *Lulla Bunseedhur v. Koonwur Bindisseree Dutt Singh* (5), *Lekraj Roy v. Mahtab Chand* (6), *Looloo Singh v. Rajendur Laha* (7), *Alfootoonnisa v. Goluck Chunder Sen* (8), *Sheoraj Kower v. Nukchedee Lall* (9), *Sherafutoollah Chowdhry v. Abedoonissa Bibee* (10), *Modhoo Soodun Sing v. Rajah Pirtkee Bullub Paul* (11), and *Prosunno Kumari Debya v. Golab Chand* (3).

The judgment of the Court was delivered by—

GARTH, C. J. (who, after stating the facts, continued) :—Without going at length, however, into the general question how far a minor is bound by a decree made against his guardian, during his minority, we think it clear that in this case the plaintiff was entitled to bring the fresh suit for the purpose of asserting his rights, and that, as against

(1) 16 W. R., 252.

(2) 24 W. R., 46; S. C. reported as *Shurru Chunder Chatterjee v. Rajkissen Modkerjee*, 15 B. L. R., 350.

(3) 14 B. L. R., 450.

(4) 6 Moore's I. A., 393.

(5) 10 Moore's I. A., 454.

(6) 14 Moore's I. A., 393.

(7) 8 W. R., 364.

(8) 15 B. L. R., 353.

(9) 14 W. R., 72.

(10) 17 W. R., 374.

(11) 16 W. R., 231.

the present defendants, it was the only effectual remedy which he could pursue. If his object had merely been to reverse or alter the judgment in the former suit, it is possible that an application for a review would have answered his purpose. But the plaintiff's object was to unrip transactions which formed no part of the proceedings in the former suit, and as against Rameswar Dutt, who merely acted in that suit as the plaintiff's guardian, and as against Mr. Cosserat, who had nothing whatever to do with the former suit, it is obvious that any application for the review of the proceedings in that suit would have been utterly ineffectual, and that as against these persons the plaintiff's only remedy was the one which he has adopted. His contention and his interests in this suit are not identical with, but directly opposed to, those of Rameswar Dutt.

He says, that Rameswar, acting professedly as his guardian, has been dealing with his property in a way which the law expressly forbids, and that, in consequence of his having so dealt with it, and also in consequence of certain legal proceedings in which Rameswar has improperly acquiesced, his (the plaintiff's) share of the mortgaged property has wrongfully come into the hands of Mr. Cosserat, and his object is to release his share of the property from the position in which it has been placed by the wrongful acts of his guardian.

The first question, therefore, which we have to decide is, whether the defendant Rameswar was acting illegally when he mortgaged the plaintiff's share by the deed of July 14, 1867.

It is admitted that he was appointed guardian of the plaintiff under Act XL. of 1858, and that he never obtained the sanction of the Judge to the mortgage, as by s. 18 of that Act he was bound to do.

The words of the section are : " No such person " (*i. e.*, guardian of the estate under a certificate granted under the Act) " shall have power to sell or mortgage any immoveable property or to grant a lease thereof for any period exceeding five years without an order of the Civil Court previously obtained."

The same words are used in s. 14, Act XXXV. of 1858, limiting the powers of a manager of a lunatic's estate, and it was held by Phear and Ainslie, JJ., in *The Court of Wards v. Kupulmun Singh* (1), that, after the passing of the Act, no manager, *de facto* or *de jure*, can have power to do that which the Act forbids.

There is a decision of Macpherson and Lawford, JJ., in *Suru*,

(1) 10 B. L. R., 364.

(2) 24 W. R., 46.

*Chunder Chatterjee v. Aushootosh Chatterjee* (2), in an appeal in which the only question was the effect of s. 18, Act XL. of 1858, and it was held that a sale made by a guardian without authority from the Court was invalid, even though the purchaser had acted honestly and paid a fair price.

On the other hand, a case was relied upon by the defendants *Alfootoonnissa v. Goluck Chunder Sen* (1), decided by Markby and Mitter, JJ., from which it would appear that those learned Judges considered that a mortgage of a minor's property by his guardian without the consent of the Court was a mere irregularity. But we have consulted Mr. Justice Markby, who delivered the judgment in that case, and who informs us, that although the word "irregularity" might have been used, it was by no means the intention of the Court in that case to treat the conduct of the guardian in mortgaging his ward's property without leave of the Court as any other than a direct breach of the law; and we find also that, before Macpherson and Lawford, JJ. delivered judgment in the case of *Surut Chunder Chatterjee v. Aushootosh Chatterjee* (2), they also consulted Markby and Mitter, JJ., and that the judgment in the latter case was given with their express concurrence. The ground of the decision by Markby and Mitter, JJ., in *Alfootoonnissa v. Goluck Chunder Sen* (1) was, that events had subsequently transpired in that case which induced the Court to hold that the mortgage, though improper and unauthorized in the first instance, ought to stand; more especially, as in the suit which was afterwards brought upon the mortgage-deed, and in which a decree was obtained, the minor himself was properly represented. Their decision, therefore, will be found not to conflict with the view which we take in the present case.

In this case we are of opinion that, in mortgaging the plaintiff's share without the sanction of the Court, the defendant Rameswar was, undoubtedly, dealing with his ward's property in a way which the law forbids, and that in not defending the suit brought upon the mortgage-bond, and allowing the property to be sold under the decree, he was improperly sacrificing his ward's interests.

Subodra Bibee, the mortgagee, took the mortgage, carried on the suit, and purchased the property with full knowledge of Rameswar's conduct; and the defendant, Mr. Cosserat, had also notice that Rameswar had been dealing with his brother's property in a way unwarranted by law, because it appears that there was an agreement

dated the 5th February, 1868, made by Bisseswar, Rameswar, and Purmeswar, with Mr. Cosserat, reciting that Rameswar had been appointed guardian of his minor brother Debi Dutt, and that he, as such guardian, and for himself, together with his other two brothers, had, on 9th January, 1868, sold the Dhubolia Indigo Factory to Mr. Cosserat. The agreement then goes on to indemnify the purchaser specially in respect of any claim that might be thereafter put forward by the minor brother, Debi Dutt, and generally in respect of any other claims. This document shows that Mr. Cosserat must, at least, have understood that, in purchasing the minor's property, he was on dangerous ground, and having this knowledge, he was bound to satisfy himself that the mortgage-bond had been duly executed under the authority of the Civil Courts, as required by law. He cannot say that he was a *bond fide* purchaser for value without notice, for he certainly had notice that Rameswar Dutt's power of dealing with his ward's property was only such as a guardian appointed under Act XL. of 1858 could exercise; and he was, therefore, bound to enquire whether the mortgage had ever been sanctioned by the Court. As a purchaser from Snubodra he could take no better title than she had, and unless the decree protected her title, it does not secure his. But she cannot be protected by the decree. She knew from the first, that Rameswar had acted in a manner unauthorized by law; she knew that the suit on the mortgage-bond had been undefended; and further, that notice of that suit had not been given to any one but to those whose interests were opposed to those of the minor. But then it was urged very strongly by the defendant's pleader, that if the debts for which the bond of the 14th July, 1867, was given, were debts due by the father, or if they were debts incurred by all the brothers in carrying on a business which they had a right to carry on for and at the risk of the plaintiff, Rameswar would have been justified in giving a simple money-bond at reasonable interest for the payment of those debts, and that, upon that bond, a decree might have been obtained by the bond-holder, and the property in question sold under that decree.

It was then argued that the instrument of the 14th July, 1867, was only a bond of this description, with a mortgage of the property in question superadded by way of further security; that the suit was founded upon the personal obligation of this bond, as well as upon the mortgage security; that, consequently, the defendant had a right to sever one portion of the instrument from the other, and to insist that

there was quite sufficient cause of action to support the decree without reference to the mortgage portion of the transaction.

But assuming, for the purposes of argument, that in this instance the mortgagee could have severed one portion of the instrument from the other (which is at least doubtful), and that she could have sued upon the deed of July, 1867, as a simple money-bond, and obtained a decree in that suit, and sold the plaintiff's share of the property, the answer is, that in point of fact she has not adopted that course. She has sued upon the instrument as a mortgage-bond; she has obtained a decree upon it as a mortgage-bond; the decree is such as she could not have obtained, if she had sued merely upon the personal obligation; and it was under that decree that the property has been sold. The defendants, therefore, cannot now change the nature of that suit, or the form of the decree, for the purpose of placing themselves as purchasers under that decree in a different or better position; and as we find that Subodra and Mr. Cosserat were both affected with notice of Rameswar's improper conduct, we consider that the plaintiff is entitled to succeed in this suit as against all the defendants, and to recover possession of his share from Mr. Cosserat.

The appeal must, therefore, be allowed with costs, and interest as usual, payable by the respondents who have appeared; and the plaintiff must be declared entitled to recover the property in suit, with costs bearing interest at 6 per cent. per annum from date of decree of the Lower Court, payable by Rameswar Dutt Sahoo, Subodra Bibee, and Mr. Cosserat.

*Appeal allowed.*

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## PRINCIPLES OF THE INDIAN PENAL CODE.

*[As explained by the original framers and laid before the Governor-General of India in Council in the year 1837.]*

NOTE B.—(Continued.)

*(In continuation of page 31.)*

## ON THE CHAPTER OF GENERAL EXCEPTIONS.

We have now made such observations as appear to us to be required on the general exceptions which we propose. It is proper that we should next explain why we have not proposed any exception in favor of some classes of acts which, as some persons may think, are entitled to indulgence.

We long considered whether it would be advisable to except from the operation of the Penal Clauses of the Code acts committed in good faith from the desire of self-preservation : and we have determined not to except them.

We admit indeed that many acts falling under the definition of offences ought not to be punished when committed from the desire of self-preservation : and for this reason, that, as the Penal Code itself appeals solely to the fears of men, it never can furnish them with motives for braving dangers greater than the dangers with which it threatens them. Its utmost severity will be inefficacious for the purpose of preventing the mass of mankind from yielding to a certain amount of temptation. It can, indeed, make those who have yielded to the temptation miserable afterwards. But misery which has no tendency to prevent crime is so much clear evil. It is vain to rely on the dread of a remote and contingent evil as sufficient to overcome the dread of instant death, or the sense of actual torture. An eminently virtuous man indeed will prefer death to crime. But it is not to our virtue that the penal law addresses itself : nor would the world stand in need of penal laws, if men were virtuous. A man who refuses to commit a bad action, when he sees preparations made for killing or torturing him unless he complies, is a man who does not require the fear of punishment to restrain him. A man on the other hand who is withheld from committing crimes solely or chiefly by the fear of punishment, will never be withheld by that fear when a pistol is held to his forehead or a lighted torch applied to his fingers for the purpose of forcing him to commit a crime.

It would, we think, be mere useless cruelty to hang a man for voluntarily causing the death of others by jumping from a sinking ship



into an overloaded boat. The suffering caused by the punishment is, considered by itself, an evil, and ought to be inflicted only for the sake of some preponderating good. But no preponderating good, indeed no good whatever, would be obtained by hanging a man for such an act. We cannot expect that the next man who feels the ship in which he is left descending into the waves, and sees a crowded boat putting off from it, will submit to instant and certain death from fear of a remote and contingent death. There are men, indeed, who in such circumstances would sacrifice their own lives rather than risk the lives of others. But such men act from the influence of principles and feelings which no penal laws can produce, and which, if they were general, would render penal laws unnecessary. Again, a gang of dacoits, finding a house strongly secured, seize a smith, and by torture and threats of death induce him to take his tools and to force the door for them. Here, it appears to us that to punish the smith as a housebreaker would be to inflict gratuitous pain. We cannot trust to the deterring effect of such punishment. The next smith who may find himself in the same situation will rather take his chance of being, at a distant time, arrested, convicted, and sentenced to imprisonment, than incur certain and immediate death.

In the cases which we have put some persons may perhaps doubt whether there ought to be impunity. But those very persons would generally admit that the extreme danger was a mitigating circumstance to be considered in apportioning the punishment. It might however with no small plausibility be contended that if any punishment at all is inflicted in such cases, that punishment ought to be not merely death, but death with torture. For the dread of being put to death by torture might possibly be sufficient to prevent a man from saving his own life by a crime, but it is quite certain, as we have said, that the mere fear of capital punishment which is remote, and which may never be inflicted at all, will never prevent him from saving his life. And *a fortiori* the dread of a milder punishment will not prevent him from saving his life. Laws directed against offences to which men are prompted by cupidity ought always to take from offenders more than those offenders expect to gain by crime. It would obviously be absurd to provide that a thief or a swindler should be punished with a fine not exceeding half the sum which he had acquired by theft or swindling. In the same manner laws directed against offences to which men are prompted by fear ought always to be framed in such a way as to be more terrible

than the dangers which they require men to brave. It is on this ground, we apprehend, that a Soldier who runs away in action is punished with a rigor altogether unproportioned to the moral depravity which his offence indicates. Such a Soldier may be an honest and benevolent man, and irreproachable in all the relations of civil life. Yet he is punished as severely as a deliberate assassin, and more severely than a robber or a kidnapper. Why is this? Evidently because, as his offence arises from fear, it must be punished in such a manner that timid men may dread the punishment more than they dread the fire of the enemy.

If all cases in which acts falling under the definition of offences are done from the desire of self-preservation were as clear as the cases which we have put of the man who jumps from a sinking ship into a boat, and of the smith who is compelled by dacoits to force a door for them, we should, without hesitation, propose to exempt this class of acts from punishment. But it is to be observed that in both these cases the person in danger is supposed to have been brought into danger, without the smallest fault on his own part, by mere accident, or by the depravity of others. If a Captain of a Merchantman were to run his ship on shore in order to cheat the insurers, and then to sacrifice the lives of others in order to save himself from a danger created by his own villainy,—if a person who had joined himself to a gang of dacoits with no other intention than that of robbing, were at the command of his leader, accompanied with threats of instant death in case of disobedience, to commit murder, though unwillingly,—the case would be widely different, and our former reasoning would cease to apply. For it is evident that punishment which is inefficacious to prevent a man from yielding to a certain temptation may often be efficacious to prevent him from exposing himself to that temptation. We cannot count on the fear which a man may entertain of being brought to the gallows at some distant time as sufficient to overcome the fear of instant death. But the fear of remote punishment may often overcome the motives which induce a man to league himself with lawless companions in whose society no person who shrinks from any atrocity that they may command can be certain of his life. Nothing is more usual than for pirates, gang-robbers and rioters to excuse their crimes by declaring that they were in dread of their associates, and durst not act otherwise. Nor is it by any means improbable that this may often be true. Nay, it is not improbable that crews of pirates and gangs of robbers may have committed crimes which every one among them was un-

willing to commit, under the influence of mutual fear. But we think it clear that this circumstance ought not to exempt them from the full severity of the law.

Again, nothing is more usual than for thieves to urge distress and hunger as excuses for their thefts. It is certain, indeed, that many thefts are committed from the pressure of distress so severe as to be more terrible than the punishment of theft, and than the disgrace which that punishment brings with it to the mass of mankind. It is equally certain that when the distress from which a man can relieve himself by theft is more terrible than the evil consequences of theft, those consequences will not keep him from committing theft. Yet it by no means follows that it is irrational to punish him for theft. For though the fear of punishment is not likely to keep any man from theft when he is actually starving, it is very likely to keep him from being in a starving state. It is of no effect to counteract the irresistible motive which immediately prompts to theft. But it is of great effect to counteract the motives to that idleness and that profusion which end in bringing a man into a condition in which no law will keep him from committing theft. We can hardly conceive a law more injurious to society than one which should provide that as soon as a man who had neglected his work, or who had squandered his wages in stimulating drugs, or gambled them away, had been thirty-six hours without food, and felt the sharp impulse of hunger, he might, with impunity, steal food from his neighbours.

We should therefore think it in the highest degree pernicious to enact that no act done under the fear even of instant death should be an offence. It would *a fortiori* be absurd to enact that no act under the fear of any other evil should be an offence.

There are, as we have said, cases in which it would be useless cruelty to punish acts done under the fear of death, or even of evils less than death. But it appears to us impossible precisely to define these cases. We have, therefore, left them to the Government which, in the exercise of its clemency, will doubtless be guided in a great measure by the advice of the Courts.

(To be continued.)

## BOMBAY HIGH COURT.

*The 4th July, 1877.*

## PRESENT :

Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice Melvill.

SUBHABHAT BIN BABANBHAT \*(Plaintiff) *Appellant*,*versus*VASUDEVBHAT BIN SUBHABHAT and others (Defendants) *Respondents*.*A sale convertible into a mortgage.*

Where a deed, which on the face of it was described as a mortgage, stated that the grantee was already in possession under a previous mortgage by the grantor, and was under the second deed to receive the profits in liquidation of interest so far as they would go, and that the grantor was not to be liable to repay the principal money or such balance of interest (if any) as might accrue upon it, unless he adopted a son, and the grantee, unless that event happened, was to enjoy the property conveyed in right of purchase for the sum (principal and interest) due to him,

*Held* that the deed was a sale liable to be converted into a mortgage, and not a mortgage liable to be converted into a sale.

*Howard v. Harris*, (1) *Ramji v. Chinto*, (2) *Shankurbhai v. Kassibhai*, (3) referred to and distinguished.

This was a special appeal from the decision of W. H. Crowe, District Judge of Kanara, affirming the decree of J. L. Fernandez, Subordinate Judge at Coompta.

The plaintiff Subhabhat brought this suit against Vasudevbbhat and four others to redeem a mortgage of certain immoveable property described in the plaint. He alleged that the property originally belonged to one Haribhat, from whose representatives—the fourth and fifth defendants—the plaintiff had himself purchased it. Vasudevbbhat, the first defendant, pleaded that he was the owner of the property in dispute; that it was mortgaged to his ancestor Subbhat Gopi by the said Haribhat by two deeds, the later of which (Exhibit No. 21) was dated the 12th March 1832, and intended to operate as a sale if the said Haribhat died without adopting a son, which event happened, and that consequently this defendant's ancestor became the absolute owner of the property. The answers of the other defendants are not material to the case.

\* *Vide* I. L. R., 2, Bom. p. 113.

(1) 1 Vern. 190 ; S. C. 2 Wh. and Tud.  
L. C. 947, 3rd Ed.

(2) 1 Bom. H. C. Rep. 199.

(3) 9 Bom. H. C. Rep. 69.

The following is an English translation of Exhibit No. 21 on which he first defendant based his claim :—

“ Prosperity. The year of the victorious king Shalivahan, 1753, Khara being the name of the cyclical year, the month Falgoon Shoodh, the date 10th, Monday, the Fasli year 1241 [1832 A. D.] the 12th of March. To Shrimant Shootbhat, son of Shambhat Gopi. A second [or additional] mortgage-deed of land is executed by Haribhat, son of Raghoobhat, as follows :—

Owing to my necessity, I formerly, on the 2nd of Kartik Shoodh, in the cyclical year called Vikrama (7th November 1820), mortgaged, for Hons 36 and Falams  $2\frac{1}{2}$  (Rs. 145), to your elder brother Mahabaleshvar that my share in my muli-land, and my share in the allowances payable to the god Ramathirtha, together with the profits which accrue from the Upadhipship to the god Shri Mahabaleshwar, with right to enjoy the same, and made over into your possession the said land, the allowances and the profits. Latterly I received from you (money in) cash, rice, and other goods. Together with the value thereof, the debts found, on account made up to this day, to amount to Hons 38 and Falams  $6\frac{1}{2}$  [Rs. 154-8-0]; I have no other means whereby to pay you interest thereon. Therefore, as you have been enjoying all the property mentioned in the original mortgage-deed with the right to enjoy the same, passed by me, as also my house-site, and the rent, Hons 2 and Falams  $2\frac{1}{2}$  [Rs. 9], of my share due from Belean Jetti, so you may continue to enjoy the same in reduction of interest, as much as possible, on sums borrowed by me. I will manage the Pujariship of the god Ramathirtha, and the Upadhipship of the temple of Shri Mahabaleshvar. If I get a boy of my liking for adoption, and make him my adopted son, I will pay you off, in one lump sum, Hons 36 and Falams  $2\frac{1}{2}$  due under the original mortgage deed and the money due under the second mortgage, together with interest remaining due, and redeem my share of land, allowances, profits aforesaid. In the event of my not adopting a son, my share of property, all muli-land, allowances, profits, &c., may be enjoyed by you in the same way as I did, in right of purchase for the sum, principal, and interest due to you. Even the Pujariship of the god Ramathirtha, and the Upadhipship of the god Shri Mahabaleshvar, so far as appertaining to my share, may be enjoyed by you. You are to enjoy the same from generation to generation. Thus I execute the second mortgage. The proceeding in respect of the house-site is also

given into your charge. Thus I execute the second mortgage. The signature of Haribhat."

The Subordinate Judge held the suit barred, and rejected the plaintiff's claim. In appeal that decree was confirmed by the District Judge.

*Shamrav Vithal*, for the appellant:—Restrictions on the redemption of a mortgage are always discountenanced in equity. No agreement in a mortgage can make it irredeemable, either after the death of the mortgagor, or upon failure of issue male of his body, as held in *Howard v. Harris*.<sup>(1)</sup> The learned pleader also cited Fisher on Mortgages, page 278, Section 489, 2nd Edition.

*Shantaram Narayan*, for the respondent.

WESTROPP, C. J.:—Although the deed of the 12th March 1832 (Exhibit 21) is on the face of it described as a mortgage, it is necessary to see whether its contents warrant that description. The grantee was already in possession under a mortgage of the 7th November 1820, and was under the new deed to receive the profits in liquidation of interest so far as they would go—and, as it appears to us, the grantor was not to be liable to repay the principal money, or such balance of interest (if any) as might accrue upon it, unless he adopted a son. We do not perceive how, so long as he remained without making such an adoption, the grantee could have maintained any suit against him either for principal or interest—(vide *Goodman v. Grierson* <sup>(2)</sup> and *per Cottenham L. C.* in *Williams v. Owen* <sup>(3)</sup>). In *Howard v. Harris* <sup>(4)</sup> there was a covenant by the mortgage to pay, upon which he might be sued by the mortgagee—a circumstance which distinguishes that from the present case. Here, in fact, there would not have been any debt whatever due from the grantor until he adopted a son, and the grantee, except in that event, would not have the usual remedies of a mortgagee. This, therefore, seems to us to be a case of a sale liable to be converted into a mortgage, and not like *Ramji v. Chinto*,<sup>(5)</sup> *Shankarbai v. Kassibhai* <sup>(6)</sup> and the cases there mentioned, which are instances of mortgages liable to be converted into sales. There has not been any adoption by the grantor here, and he could not have redeemed unless he adopted a son. For these reasons we affirm the decree of the District Judge with costs.

*Decree affirmed.*

(1) Vern. 190; S. C. 2 Wh. and Tud. L. C. 947, 3rd Ed.

(2) 2 B. and B. 274, 279.

(4) 1 Vern. 190.

(3) 5 My. and Cr. 303, 308.

(5) 1 Bom. H. C. Rep. 199.

(6) 9 Bom. H. C. Rep. 69.

## BOMBAY HIGH COURT.

*The 17th January, 1877.*

PRESENT :

Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice Nanabhai Haridas.

SATRA KUMAJI,\* (Plaintiff) *Appellant*,*versus*VISRAM HASGAVDA, (Defendant) *Respondent*.*Deed of assignment of mortgage—Consideration—Registration*

A deed of assignment for a consideration of less than Rs. 100, of a mortgage for a consideration of Rs. 100, or upwards, does not need registration.

*Vasudev v. Rama* (11 Bom. H. C. Rep. 149) and *Rohinee Debia v. Shib Chunder Chatterjee* (15 Calc. W. R. 558 Civ. Rul.) followed.

This was a special appeal from the decision of W. M. Coghlan, District Judge at Thana, affirming the decree of Balaji Raghunath, 2nd Class Subordinate Judge at Alibag.

The plaintiff, as assignee of a mortgage for Rs. 100, sued to recover from the defendant personally, or from the mortgaged property, the sum of Rs. 157-8-0, due under the mortgage for principal and interest.

The deed of assignment to the plaintiff purported to have been executed in consideration of the sum of Rs. 57, paid by the plaintiff to the original mortgagee, and was unregistered. Both the Lower Courts held that as the deed of assignment conveyed an interest in immoveable property, which was valued at Rs. 100 in the mortgage deed, the deed of assignment ought to have been registered, and rejected the plaintiff's claim, as it was based upon such unregistered deed. The original mortgage was registered.

*Bhairavnath Mangesh*, for the appellant, contended that both the Lower Courts were wrong in holding that registration of the deed of assignment was necessary, and relied on *Vasudev v. Rama*.<sup>(1)</sup>

*Mahadev Chimnaji* for the respondent.

WESTROPP, C. J. :—The Court, following its own decision in *Vasudev Moreshwar Gunpule v. Rama Babaji Dange*<sup>(2)</sup> and the Calcutta decision—*Rohinee Debia v. Shib Chunder Chatterjee*,<sup>(3)</sup> holds that the deed of assignment (Exhibit No. 4), being for a consideration less than

\* *Vide* I. L. R., 2, Bom. p. 97.

(1) 11 Bom. H. C. Rep. 149.

(2) 11 Bom. H. C. Rep. 149.

(3) 15 Calc. W. R. 558, Civ. Rul.

Rs. 100, did not require registration. It may be that the parties to the original mortgage, (Exhibit No. 3,) valued the security and the solvency of the parties at Rs. 100 or upwards, but it does not thence follow that either or both were deemed of that value at the date of the assignment, and it was for the parties to that latter transaction, for the purposes of registration, to fix the value of the interest thereby assigned. This Court, therefore, reverses the decree of the District Judge and remands this cause for a new trial on the merits.

*Decree reversed.*

HIGH COURT, N. W. P.

*The 21st June, 1877.*

PRESENT:

Mr. Justice Pearson and Mr. Justice Turner.

GANPAT RAI,\* and another (Defendants) *Appellants*,

*versus*

SARUPI (Plaintiff *Respondent*).

*Money-decree passed on Mortgage-bonds— Mortgage-rights not conveyed by Sale of Money-decree.*

The purchaser of a single money decree passed on a bond hypothecating property does not merely by his purchase acquire a lien upon the property.

One Budri Das the mortgagee of certain lands and houses obtained in 1868 a money-decree on his mortgage-bonds. The plaintiff's husband, one Narayan Das, together with one Jamna Das purchased in 1871 the said decree. The said Narayan Das having died the plaintiff brought this suit as his widow and guardian of his minor sons, alleging that the said Narayan Das by the purchase of the said money-decree acquired with his co-vendee the mortgage-rights of Budri against the said property, and seeking to enforce a moiety of these rights by sale of the said property. The defendants were the original mortgagors and certain auction-purchasers of the said property under sales effected in execution of money-decrees obtained by other persons against the said mortgagors. The co-vendee having declined to join in the suit was made a *pro forma* defendant.

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\* Vide I. L.R., 1, All. p. 446.



The defendants set up a number of pleas in the Subordinate Judge's Court, but the Subordinate Judge overruled them and gave a decree to the plaintiff.

The defendants in appeal to the High Court, in addition to the pleas urged in the Court of first instance, relied on the further ground that under the deed of sale conveying the rights conferred by the money-decree of 21st December, 1868, no hypothecation rights against the property passed to the purchasers of the said decree.

Pandit *Bishambhar Nath* and the *Junior Government Pleader* (*Babu Dwarka Nath Banarji*), for appellants.

Munshi *Hanuman Prasad* and *Babu Barodha Prasad*, for respondent.

The judgment of the Court was delivered by.

TURNER, J.—The sale in this case extended not to the original debt but to the decree, and in the sale-deed no reference is made to any securities held by the original creditor. In our judgment then the sale-deed conveyed to the purchaser no title to the securities.

We do not say that if the debt itself had been sold the purchaser might not have been entitled to call upon the seller to assign the securities. That question when it arises will be determined in reference to the terms of the contract, but in the case before us it is clear all that was sold was the money-decree.

Instances may be suggested in which the holder of such a decree would be unwilling to part with the lien though willing to sell the decree. He may for instance have a second mortgage of the same property, and it would in our judgment lead to injustice to hold that the sale of the decree carried with it necessarily the right to an assignment of all securities held by the original creditor.

Whether this be so or not the lien in the present instance has not been assigned to the plaintiffs, and, therefore, they cannot claim the benefit of it. The decree of the Court below must be reversed and the suit dismissed with costs.

*Appeal allowed.*

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### IMPORTANT DIRECTION.

*Note* that the case of *Raj Coomar Sing vs. Sahebzada Rai* in 5, Legal Companion, p. 221 (Copy for September 1877) has been reported in the Indian Law Reports, 3, Calcutta Series, p. 20 (Copy for January 1878).

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### SHORT NOTES.

#### PRIVY COUNCIL.

*"The Pensions Act, 1871"—Jurisdiction — Deshmukh.*

A plaintiff alleging that, as the hereditary Deshmukh of certain mahals, he was entitled to be paid directly by the ryots of these mahals a percentage on the revenue thereon assessed, sued to recover a portion of such percentage which had been collected along with the revenue and retained by the Government: *Held* that the claim was "a suit relating to a grant of money or land-revenue," and as such excluded from the jurisdiction of the Civil Courts by Section 4 of "the Pensions Act, 1871."

*Vide* Indian Law Reports, 2, Bombay Series, p. 99.—Vasudev Sadashiv Modak vs. The Collector of Ratnagiri.

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#### CALCUTTA HIGH COURT.

*Hindu Law—Mitakshara—Son's Interest in Ancestral Estate—Burden of Proof.*

In a suit by a son to set aside an alienation of property made by his father during the son's minority, it was shown that the property in suit originally belonged to the plaintiff's grandfather, who came to a partition of his property with his brother: and that, on the death of the plaintiff's grandfather, his two sons, the father and uncle of the plaintiff, divided the estate between them, the property in suit falling to the share of the plaintiff's father. It was sought to set aside the alienation on the ground that there was no legal necessity for effecting it. The suit was brought seven or eight years after the plaintiff attained his majority.

*Held* that, notwithstanding the partition by the plaintiff's father, the property was ancestral property in which the plaintiff at his birth acquired an interest.

*Held* also, reversing the decision of the Courts below, that the question to be tried in the suit was, according to the decision of the Privy Council

in *Girdharce Lall v. Kantoo Lall*. (14, B. L. R., 187) not whether there was any legal necessity for the alienation, but whether the debt of the father, in satisfaction of which the alienation was made, was incurred for an immoral purpose, and that, under the circumstances, the onus was on the plaintiff to show that it was.

*Quære*.—Is a son bound to discharge debts of the father which are illegal, though not immoral?

*Vide* Indian Law Reports, 3, Calcutta Series, 1.—*Adurmoni Deyi vs. Chowdhry Sib Narain Kur*.

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*Res judicata*—*Limitation*—*Beng. Act VIII. of 1869, s. 29*—*Tenancy in abeyance*—*Obligation to payment*.

*A*, the zemindar, granted a patni lease of certain talooks to *B*, who assigned it to *C* and *D*. On *B*'s death, *C* and *D* applied to the Collector for registration of the patni talook in their names as assignees of *B*. *A* objected to the registration on the ground that the lease enured only for the life of *B*. *A*'s objection being overruled, he instituted a regular suit to eject *C* and *D*, the present defendants, which was decided against *A* finally by the Privy Council in 1874. During the pendency of this litigation, the zemindar sued to recover the rent for the year 1868, not upon the basis of the patni lease, but for use and occupation, treating the tenants as mere trespassers. This suit was dismissed on the ground that the plaintiff ought to have sued on the lease. In 1875, the plaintiff brought the present suit for the rent of 1868 on the patni lease. The defendants pleaded *res judicata* and limitation. The plaintiff contended that the suit was within time on the ground that the right to recover the rent was in suspense during the pendency of the litigation regarding the lease. *Held*, that the suit, though not *res judicata*, was barred under s. 29 of Beng. Act VIII. of 1869.

*Vide* Indian Law Reports, 3, Calcutta Series, p. 6.—*Watson & Co. vs. Dhondra Chunder Mookerjee*.

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*Res Judicata*—*Act VIII. of 1859, s. 2*—*Suit for Specific sum of Money*.

In a suit for a specific sum of money, it was held in accordance with the Full Bench decision in *Dinobundhoo Chowdhry v. Kristomonee Dossee* that the plaintiff was bound to put forward every right under which he claims.

*Vide* Indian Law Reports, 3, Calcutta, p. 23.—*Bheeka Lall vs. Bhuggoo Lall*.

*Limitation Act IX. of 1871, sched. ii, arts. 11, 118—Exclusive Privilege  
—Account of Profits—Damages—Act XV. of 1859, s. 22.*

In a suit for an account of profits obtained by the infringement of an exclusive privilege, the period of limitation, the taking of an account being only a mode of ascertaining the amount of damages, is the same as the period of limitation for an action for damages on the same ground, viz., the period prescribed by art. 11, sched. ii, Act IX. of 1871.

*Vide Indian Law Reports, 3, Calcutta Series, 17.—Kinmond vs. Jackson.*

*Co-Sharers—Suit for Enhancement of Rent—Non-joinder of Parties—Suit  
barred by limitation as to added Parties—Act IX. of 1871, s. 22—  
Beng. Act VIII. of 1869, s. 29.*

In a suit for the recovery of rent at an enhanced rate, brought by two of four brothers, joint and undivided owners of the tenure, the other two brothers, on an objection taken by the defendant that they ought to have been parties to the suit, presented a petition signifying their assent to the institution of the suit, and were thereupon treated as parties to the suit. This application was, however, made after the period of limitation prescribed for such a suit had expired. *Held* by Markby, J., that although the rights of such added parties were absolutely barred, yet the Court could proceed to adjudicate upon and declare the right of the remaining plaintiffs who had originally filed the suit, and that, as the claim for rent was indivisible, the decree in their favour should be for the whole amount.

By PRINSEP, J.—The objection as to the defect of parties after the case had passed through two Courts, is not one affecting the merits of the case so as to be a ground of special appeal.

*Vide I. L. R., 3, Calcutta Series, p. 26.—Boydonth Bag vs. Grish Chunder Roy and another.*

MADRAS HIGH COURT.

*Administrator-General—Barred debt—Payment.*

The Administrator-General of Madras is authorized to pay a barred debt.

*Vide Indian Law Reports, 1, Madras Series, p. 267.—Administrator-General vs. E. J. Hawkins.*

*Indian Penal Code, [Sec. 160—Sentence, legality of—Criminal Procedure Code, Sec. 309.*

Prisoners were convicted of having committed an offence punishable under Section 160 of the Indian Penal Code, and were sentenced to pay a fine of Rs. 25 each, or in default to be rigorously imprisoned for 30 days, the full term of imprisonment under the section.

*Held* by a majority of the High Court (KINDERSLEY, J., dissenting) that having regard to the provisions of Sec. 309 of the Criminal Procedure Code, Act X. of 1872, the sentence was legal.

*Vide* Indian Law Reports, 1, Madras Series, p. 277.—*Reg. vs. Muhammad Saib and another.*

*Salt earth—Collection of—Madras Regulation I. of 1805, Sec. 18.*

The collecting of salt earth from salt swamps, or the being in possession of salt earth for the purpose of making salt is not an offence within the meaning of Sec. 18 of Madras Regulation I. of 1805.

*Vide* Indian Law Reports, 1, Madras Series, p. 178.—*Reg vs. Pyla Atchi and others*

BOMBAY HIGH COURT.

*Company—Contributory—Description—Balance order—List of contributories—Cause of action—Evidence—Amendment of plaint.*

Where the holder of shares in a company was described in the list of contributories, against whom a balance order by the Court of Chancery had been made, as "Devji Bhanji, cotton merchant," and as being sued "in his own right,"

*Held* that the plaintiff company could not be allowed to give evidence that the shares were in fact held by a firm consisting of two individuals, named respectively Bhanji Zutani and Devji Hemraj; nor could the plaintiffs be allowed, at the hearing of the appeal, to amend their plaint, originally framed against both partners with a view to making the firm liable for the amount of the calls, so as to sue Bhanji Zutani only, who alone was alleged to have signed the articles and memorandum of association in the name of Devji Bhanji, and to make him personally liable as the holder of the shares—*Weikersheim's Case* (L. R., 8 Ch. Ap. 831) distinguished.

*Vide* L. R., 2, Bombay, p. 116.—*The London, Bombay and Mediterranean Bank, Limited vs. Bhanji Zutani and another.*

*Right to free pasturage—Bombay Act I. of 1865, Section 32.*

Plaintiff erected a hut on public ground, in a village in the district of Thana, and lived there annually for a few months, while his cattle grazed on the public grazing ground in that village. He was not the owner or lessee of any land in the village. On being prevented, by the Collector of Thana, from thus grazing his cattle, plaintiff brought a suit against that officer for a declaration of his right to graze his cattle within the limits, not only of that village, but of any other village in the District of Thana.

*Held* that plaintiff was not entitled to any such right.

The phrase "village cattle" in Section 32 of Bombay Act I. of 1865 does not include the cattle of any roving grazier, who may choose to squat for a few months on the public ground of a village. That Act does not vest the right of sanctioning such a diversion of the village grazing ground in the villagers themselves, but in the Revenue Commissioner, whose consent must be obtained.

*Vide* Indian Law Reports, 2, Bombay, p. 110.—*The Collector of Thana vs. Bal Patel.*

ALLAHABAD HIGH COURT.

*Charge against Immoveable property—Auction-purchaser's rights subject to Lease.*

An obligee under a bond giving him a charge upon land who sues for and obtains only a money-decree, under which he himself purchases the land, the sale-proceeds being sufficient to discharge the debt, cannot fall back on the collateral security for a debt which no longer exists. *Semble* that even if the sale-proceeds were not sufficient to discharge the debt, the obligee could not according to the principle laid down in *Khub Chand v. Kalian Das* avail himself of his collateral security to avoid a lease granted by the obligor after the date of the bond.

*Vide* Indian Law Reports, Allahabad Series, p. 433.—*Balwunt Singh vs. Gokaran Prasad.*

*Hindu Law—Joint and Undivided Ancestral Property—Definement of Shares—Insufficient Evidence of Partition—Enjoyment of Profits.*

Definement of shares in joint ancestral property recorded as separate estate in the revenue records in pursuance of an alleged intended separation between the members of a joint and undivided Hindu family does not necessarily amount to such separation, which must be shown by the best evidence, *viz.*, separate enjoyment of profits, or an unmistakable intention to separate interests which was carried into effect.

*Vide* Indian Law Reports, 1, Allahabad, p. 437. *Ambika Dei vs. Sukhmani Kuar.*

*Manorial Dues and Cesses—Feudal System—Immemorial Custom—What is best Proof thereof—Custom must be Definite to be Good—Parol and Documentary Evidence.*

The plaintiffs, zamindars, sued for a declaration of their ancient right, as against all the tenants of a certain village to appropriate all

trees of spontaneous growth and the fruits of other trees planted by the tenants : also to receive as manorial tribute a certain number of ploughs annually and a certain offering of poppy-seed and other farm-produce on the occasion of the marriage of persons of the lower caste of tenants, with a further right to levy a certain proportion of the produce of the sugarcane manufactories and fields in the village. The lower Courts having decreed the suit on vague and general parol evidence as to the existence of the said customs, *held*, (a) that where a custom regarding several cesses is alleged, the existence of the custom regarding each cess should be tried as a separate issue ; (b) that parol evidence as to the existence of such customs should be tested by ascertaining the grounds of the witness' opinion ; (c) that the best proof of custom is instances in which it has been acted on and documentary evidence that it has been enforced ; (d) that a custom to be good must be definite.

*Vide Indian Law Reports*, 1, Allahabad, p. 440.—*Lachman Rai vs. Akbar Khan*.

*Act I. of 1872 (Evidence Act), s. 91, (e)—Act VIII. of 1871 (Registration Act), ss. 17, 49—Receipt for sums paid in part of Mortgage-debt—Inadmissibility of Unregistered Receipt—Parol evidence admissible.*

A receipt for sums paid in part liquidation of a bond hypothecating immoveable property must be registered under the provisions of s. 17 of Act VIII. of 1871 to render it admissible as evidence under s. 49 of the said Act. Under illustration (e), s. 91 of Act I. of 1872, such payments may nevertheless be proved by parol evidence, which is not excluded owing to the inadmissibility of the documentary evidence.

*Vide Indian Law Reports*, 1, Allahabad, p. 442.—*Dalip Singh vs. Durga Prasad*.

*Suits cognizable by Courts of Small Causes—Act XXIII. of 1861, s. 27—Zamindari dues and cesses not coming within the classes of such suits—Joinder of causes of action between same parties.*

The plaintiff claimed from the defendants, as joint decree-holders, a fourth share of the proceeds realised by auction-sale through the Court of the Munsif of certain houses, situate on land subject to a village-custom whereby a proprietary due of the above amount was recognised and payable to the zamindar of the said land. The Division Bench of the High Court having referred to the Full Bench the question whether claims for such zamindari dues or cesses were in the nature of suits cognizable by a Court of Small Causes, *held* by the Full Bench that the claim as brought does not fall within any of the classes of suits cognizable by the Courts of Small Causes : *aliter* if the due is payable in virtue of a contract.

*Held* by the Division Bench that the claim is not bad for misjoinder, as the due was payable out of the sale-proceeds taken out of Court by the decree-holders.

*Vide Indian Law Reports* 1 Allahabad p. 444.—*Nanku vs. Board of Revenue*.

# INDEX.

## A.

*Page.*

ACQUIESCENCE, ...	...	...	...	...	...	149
ACTS, —						
1835—VI., (c. 63)	...	...	...	...	...	147
1856—XXI., s. 49,	...	...	...	...	...	89
1859—VIII., ss. 26 and 32,	...	...	...	...	...	143
" " ss. 29, 31, 36,	...	...	...	...	...	140
" " s. 2,	...	...	...	...	...	145
" " s. 148,	...	...	...	...	...	93
1859—XIII.,	...	...	...	...	...	148
1859—XIV., ss. 20, 21,	...	...	...	...	...	145
" "	...	...	...	...	...	148
1860—XLV, s. 217,	...	...	...	...	...	150
" " s. 65,	...	...	...	...	...	152
1868—I., s. 5,	...	...	...	...	...	152
1869—XXII., s. 9,	...	...	...	...	...	147
1870—VII., 12, cls I and II., Sched III. ;						
" " s. 62, cl. IV., Arts. (c) and (d) and cl. IX.	...	...	...	...	...	150
1872—X., s. 309,	...	...	...	...	...	153
" " s. 222,	...	...	...	...	...	89
1873—VIII., s. 70,	...	...	...	...	...	152
1873—XVIII., s. 7,	...	...	...	...	...	150, 152
" " s. 95,	...	...	...	...	...	150

## ADJOURNMENT.

In a suit issues having been settled, the final hearing of the suit was adjourned to a fixed date for final disposal. On that date plaintiff did not appear and the suit was dismissed under section 144 of Act VIII. of 1859. *Held*, that as this was not a case which had been adjourned in favor of either party to enable him to "produce his proofs or cause the attendance of his witnesses" the order was not one which could properly be made, ... .. 93

## ADOPTION.

The adoption of an only son is invalid. There is no authority for drawing a distinction between Sudras and other classes of Hindus upon this point, ... .. 101

ANCIENT Lights,	...	...	...	...	...	149
-----------------	-----	-----	-----	-----	-----	-----

## ATTORNEY.

An attorney who conducted himself honestly and industriously since his name was removed from the Rolls was considered by the High Court to be a fit person to be re-admitted, " ... .. 93



	<i>Page.</i>
<b>C.</b>	
CAUSE of Action, ... ..	148
CHARGE, ... ..	150
CIVIL Court, ... ..	150
CIVIL Procedure Code—(See Act VIII. of 1859.)	
COMMISSION sale, goods pledged by insolvent and re-delivered to him on, ... ..	146
CONFISCATION is not a punishment under the Criminal Procedure Code, ...	89
CONTRACT to supply labor, ... ..	148
CONTRIBUTION, suit for, ... ..	151
CONVICTION, ... ..	148
CRIMINAL Insanity, ... ..	104
CRIMINAL Procedure Code, s. 46, ... ..	148
CUSTOM, ... ..	150
<b>D.</b>	
DAMAGES, ... ..	149
DECREE, execution of (s. 47) ... ..	145, 151
"    "    of Her Majesty in Council, ... ..	151
"    "    of the High Court, ... ..	151
DECREES, Rival, ... ..	151
DELAY, ... ..	149
DELEGATION, power of, ... ..	147
DEMOLITION of building, ... ..	149
DISMISSAL of Suit, ... ..	93
<i>Vide Adjournment.</i>	
<b>E.</b>	
ENTICEMENT, ... ..	150
EXECUTION of decree, ... ..	145, 151
EX-PROPRIETARY tenant, ... ..	150
<b>G.</b>	
Goods pledged by insolvent and re-delivered to him on commission sale, ...	146
GOSAVIS, ... ..	150
<b>H.</b>	
HIGH Court, jurisdiction of, ... ..	147
HINDU lady, ... ..	148
HINDU Law, ... ..	150
HINDU Widow, ... ..	151
<b>I.</b>	
ILLEGITIMACY, ... ..	150
INDIAN Penal Code. (See Act XLV. of 1860, s. 217.)	
INSOLVENCY, ... ..	146

# INDEX.

iii

	Page
INSOLVENT Act, 11 and 12 Vict., c. 21, s. 24, ... ..	146
"    " goods pledged by, and re-delivered to him on commission sale, ... ..	148
INTERPRETATION of Statutes, ... ..	145
J.	
JURISDICTION, ... ..	148, 150
"    of High Court, ... ..	147
L.	
LIMITATION Act, ss. 20, 21, ... ..	145
M	
MAINTENANCE, ... ..	150
MANDATORY injunction, ... ..	149
MISNE profits, . . . . .	150
MIS-JOINDER, ... ..	151
MORTGAGE, ... ..	95, 152
"    redemption of, ... ..	151
N.	
NON-JOINDER of parties, ... ..	151
NOTICE, ... ..	149
O.	
OBSTRUCTION, ... ..	149
ORDER and disposition, ... ..	146
"    of 1st Class Magistrate, ... ..	148
"    of Revenue officer, ... ..	148
P.	
PLAINT, rejection of, ... ..	151
PLEA of limitation, (See Act XLV of 1859), ... ..	148
PLEADER, ... ..	139
<i>Vide</i> Professional Misconduct.	
POWER of delegation, ... ..	147
PRE-EMPTION, ... ..	151
PROCESS-FEES, ... ..	131
PROFESSIONAL Assistance, ... ..	149
"    MISCONDUCT.	

Where a case was struck off the file for the negligence of the pleader to appear, and the pleader instead of applying at once to the Court, at his own expense, to have the case restored to the file, wrote to the client to come down a long distance, at great expense and inconvenience, in order to oblige her, if he could, to pay him an additional fee for taking the necessary proceedings to remedy the consequences of his own neglect, the Full Bench considered him not to be a fit person to be entrusted with the conduct of business, or the interests of clients, and his name was ordered to be struck off the rolls of Vakils,

## R.

REDEMPTION of mortgage, ...	...	...	...	...	151
REFERENCE, ...	...	...	...	...	148
REJECTION of plaint, ...	...	...	...	...	151
RES-JUDICATA, ...	...	...	...	...	145
REVENUE Court, ...	...	...	...	...	150
RIVAL Decrees, ...	...	...	...	...	151
ROLLS, attorney re-admitted to, ...	...	...	...	...	92

## S.

SALE, ...	...	...	...	...	150
SIR-LAND, ...	...	...	...	...	150, 152
SUIT for contribution, ...	...	...	...	...	151
SUDRAS, ...	...	...	...	...	101
SPECIFIC Relief Act, ...	...	...	...	...	116
STATUTES, 3 & 4 Will, IV., s. 85, ...	...	...	...	...	147
" 11 & 12 Vict., c. 21, s. 24, ...	...	...	...	...	146
" 16 & 17 Vict., c. 95, ...	...	...	...	...	147
" 17 & 18 Vict., c. 77, ...	...	...	...	...	147
" 24 & 25 Vict., c. 67, s. 22, } ...	...	...	...	...	147
" c. 104, ss. 9, 11, & 13, } ...	...	...	...	...	147
STATUTES, interpretation of, ...	...	...	...	...	145
STRIDHANAM, ...	...	...	...	...	148
SUCCESSION, ...	...	...	...	...	150
SUIT for setting aside a Mortgage deed and injunction against the Mortgagee, ...	...	...	...	...	150
SUMMARY Trial.					

*Confiscation* is not a punishment contemplated by the Code of Criminal Procedure so as to affect the mode of trial. The confiscation, which is provided for by s. 49 of Act XXI. of 1856, is merely a consequence of the conviction under that section and does not form part of the punishment for the offence. Hence, it was held by the Full Bench, that an offence under section 49, Act XXI., 1856, can be tried summarily by a Magistrate under section 222 of the Criminal Procedure Code, ...

89

## T.

TRESPASSER, ...	...	...	...	...	150
-----------------	-----	-----	-----	-----	-----

## V.

VAGUENESS in charge, ...	...	...	...	...	150
VALUATION, ...	...	...	...	...	150

## W.

WANIB-UL-ARZ, ...	...	...	...	...	151
WILL, ...	...	...	...	...	148



## CALCUTTA HIGH COURT.

*The 21st January and 18th February, 1878.*

FULL BENCH.

PRESENT :

The Hon'ble Sir R. Garth, Kt., Chief Justice, and the Hon'ble F. B. Kemp, L. S. Jackson, C. I. E., W. Markby and W. Ainslie, Justices

**THE EMPRESS vs. BAIDYA NATH DASS, MALAKAR.**

*Offence under s. 49, Act XXI. of 1856—Summary trial—S. 222 of the Code of Criminal Procedure.*

*Confiscation* is not a punishment contemplated by the Code of Criminal Procedure so as to affect the mode of trial. The confiscation, which is provided for by s. 49 of Act XXI. of 1856, is merely a consequence of the conviction under that section and does not form part of the punishment for the offence. Hence, it was held by the Full Bench, that an offence under section 49, Act XXI., 1856, can be tried summarily by a Magistrate under section 222 of the Criminal Procedure Code.

This case was referred under Section 296 of the Code of Criminal Procedure, by the Sessions Judge of Rungpore on the 30th August 1877.

The point of law involved in this case is fully stated in the referring order of the Division Bench, which was as follows :—

PRINSEP, J. (MARKBY, J., concurring.)—The matter which remains for our decision is whether an offence under Section 49, Act XXI., 1856, can be tried summarily by a Magistrate under Section 222 of the Code of Criminal Procedure.

The punishment for that offence, on which this matter depends, is thus described : (the offender) "shall forfeit for every such offence a sum not exceeding Rs. 200." It is further stated "and the liquors and drugs, together with the vessels, packages and coverings in which they are found, and the animals and conveyances used in carrying them, shall be liable to confiscation."

Section 222 of the Code declares that the Magistrate of the District may try certain offences in a summary way, and among these offences are "offences referred to in Section 148 of this Code." Such offences are described in the Code, Section 4, as "*Summary cases*." See definition.

Section 148 is to the following effect : "When a complaint is made before a Magistrate having jurisdiction in the case, that any person has committed or is suspected of having committed, any offence triable by such Magistrate and punishable with fine only, or with im-

prisonment for a period not exceeding six months, or with both, the Magistrate may issue his summons directed to such person, requiring him to appear at a certain time and place before such Magistrate to answer to the complaint."

So only offences punishable with "fine only or imprisonment for a period not exceeding six months, or with both," would be triable in a summary way under the first Clause to Section 222 already quoted.

Is an offence under Section 49, Act XXI., 1856, one punishable *with fine* only, or does the confiscation which follows on conviction from a part of the punishment, so as to alter the character of the offence as regards the mode of trial to be adopted?

In two reported decisions of this Court, it has been held that such offences are not summons cases, and therefore are not triable in a summary way, because they are punishable with confiscation as well as with fine.

We have great doubts regarding the correctness of those decisions—doubts which, we would add, are shared by the only Judge of this Court now present, who was a party to one of those decisions. We are informed that Magistrates constantly try offences of this description summarily, probably, in ignorance of the rule laid down in these decisions, and we therefore think it right to submit the matter to be authoritatively settled by a Full Bench of this Court.

We are inclined to hold that such an offence can be tried summarily as a "summary case" for the following reasons which we state, because the parties to this case are unrepresented, and therefore it is not probable that there will be any argument at the Bar.

For the procedure in the trial of offences, the Code has divided them into three classes—

Summons cases defined in Section 148. Warrant cases defined in Section 149. Sessions cases or trials in the Court of Session defined in Section 4.

If the offence under Section 49, Act XXI., 1856, is not a summons case, it must be either a warrant case or a Sessions case, and whatever opinion may be expressed regarding its falling under the category of summons cases, it clearly cannot fall within either of the two other classes. No special mode of trial has been prescribed for such an offence, and it is difficult to suppose that such cases were overlooked by the Legislature.

The proper solution of this difficulty seems to be to regard *confisca-*

tion not as a punishment contemplated by the Code of Procedure so as to affect the mode of trial.

It may be said that a sentence is the declaration of the punishment imposed. Section 20 of the Code of Criminal Procedure sets forth the powers of Magistrates in passing sentence, and these powers are limited to imprisonment, fine, and whipping. It is in consideration only of such punishments that the Code has prescribed the different modes of trial, and though confiscation of certain articles may be awarded on conviction, of any offence under a special or revenue law, such confiscation is not taken into account by the Code, as to form a portion of the sentence or to affect the nature of the offence or the mode of trial.

Further, we observe that Section 8 of the Code in providing for the trial of offences under local or special law, states that "no Court shall award any sentence in excess of its powers," and "the powers of Magistrates in respect to passing sentences on persons convicted" is set forth in Section 20, which, as already stated, only refers to three kinds of punishments—imprisonment, fine, and whipping. Confiscation under Act XXI., 1856, and also under the Salt Act, can, however, be ordered by a Magistrate.

Under these circumstances, we are inclined to hold that confiscation is no part of the sentence or punishment under the Code of Criminal Procedure, but that it follows as a consequence of the conviction.

The question referred to is that stated in the first paragraph of this reference. If the answer to the question be in the affirmative, the conviction will stand. If the answer be in the negative, the conviction and sentence, including the order of confiscation, will be set aside, and a new trial ordered.

The JUDGMENT of the FULL BENCH was as follows :—

We are clearly of opinion, that an offence under Section 49, Act XXI., 1856, can be tried summarily by a Magistrate under Section 222 of the Criminal Procedure Code.

The confiscation, which is provided for by Section 49, is merely a consequence of the conviction, and does not form part of the punishment for the offence. We observe that in the case of *Khetter Mohun Chowrangi*, to which we are referred, the question which we are called upon to decide was given up by the Government Pleader without argument; and that in the second case the learned Judges merely followed the ruling in the first, so that this would appear to be the first occasion on which the point has been seriously considered.

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## CALCUTTA HIGH COURT.

*The 21st and 25th February, 1878.*

PRESENT :

The Hon'ble Sir Richard Girth, Kt., Chief Justice, and the Hon'ble Mr. Justice Markby.

In the matter of **COCKERELL ALFRED SMITH.**

*Honest and industrious Conduct of an Attorney subsequent to his removal from the Rolls—Re-admission.*

An attorney who conducted himself honestly and industriously since his name was removed from the Rolls was considered by the High Court to be a fit person to be re-admitted.

Messrs. Branson and Bonnerjee for the applicant.

In this case Mr. Bonnerjee applied, upon petition, to the Court soliciting them to be pleased to restore Mr. Smith's name to the Roll of Attorneys.

Mr. Smith was originally struck off the Roll in the year 1875, for unprofessional conduct, in having appropriated the moneys of his client to his own purposes.

Notice of Mr. Smith's intention to apply to the Court was duly served upon Messrs. Chauntrell and Co., the attorneys for the injured client and the attorneys' association, but neither party was represented at the hearing, it being understood that they did not desire actively to oppose the petitioner's application.

Mr. Bonnerjee, on behalf of Mr. Smith, filed a number of certificates from gentlemen in the profession and in Calcutta and elsewhere, testifying as to the way in which Mr. Smith had deported himself for the past two years, and stated that Mr. Smith had effected a Policy of Assurance on his life for an amount equivalent to that which he had misappropriated from his client, and had also offered to give a bond for the amount.

The following was the judgment of the Court :—

GARTH, C. J.—(MARKBY, J., concurring).—We have entertained considerable doubt about this case, but having regard to all the circumstances, we are disposed to take a lenient view, and to re-admit Mr. Smith.

No doubt his misconduct was extremely gross, but we think that he has done his utmost to atone to his client for the injury which he has done him.

It is true he has not done much, but his means have been very

traitened. I should add that we have been much influenced in the decision at which we have arrived by the testimonials which Mr. Smith has produced, showing that he has conducted himself honestly and industriously since his name was removed from the Rolls ; and by the fact that the profession to which he belonged, and his client whom he has injured, have evidently no wish to oppose his re-admission.

Mr. Smith will be re-admitted.

### MADRAS HIGH COURT.

*The 16th March, 1877.*

PRESENT :

Sir W. Morgan, C. J. and Mr. Justice Innes.

- RYALL,\* *Appellant*,

*versus*

SHERMAN, *Respondent*.

#### *Adjournment—Dismissal of Suit—Act VIII. of 1859, sec. 148.*

In a suit issues having been settled, the final hearing of the suit was adjourned to a fixed date for final disposal. On that date plaintiff did not appear and the suit was dismissed under section 148 of Act VIII. of 1859. *Held*, that as this was not a case which had been adjourned in favor of either party to enable him to "produce his proofs or cause the attendance of his witnesses" the order was not one which could properly be made.

This appeal arose out of a suit, No. 10 of 1875, brought by Albert Ryall against F. Sherman.

*T. Rama Rao* and *R. Balaji Rao* for the Appellant.

There was no appearance for the Respondent.

The facts are sufficiently stated in the following

**JUDGMENT:**—Issues had been settled and the hearing of the suit was adjourned to a fixed date for final disposal. On the date so fixed, the plaintiff did not appear and the Judge disposed of the suit under section 148, dismissing it for default.

On an application to the Acting District Judge, Mr. Horsfall, to set aside the order dismissing the suit, the District Judge, on the 21st July 1876, refused the application on the ground that the order was not passed under section 119 but under section 148 of the Civil Procedure



Code. Petition for review of this order was presented to the District Judge, Mr. Kindersley, but he held that the order passed under section 148 was, properly viewed, an order under section 119, and that the proper course was to apply (as petitioner had done without effect) to the Acting District Judge to have it set aside.

Appeal is now made from the order of the Acting District Judge of the 21st July 1876.

This was not a case which had been adjourned in favor of either party to enable him "to produce his proofs or cause the attendance of his witnesses," and the order, therefore, is not one which could properly have been made under section 148.\* The suit came on on the date to which, after settlement of issues, it had been adjourned under section 145† in the ordinary way for final disposal.

In such a case the Court might proceed under section 117‡ and section 114|| to dismiss the suit for default of appearance by plaintiff.

The application of plaintiff to set aside this order was thus properly made under section 119,¶ and the order of Mr. Horsfall was incorrect. We shall set aside his order, and direct that the District Judge do replace the application, Civil Miscellaneous Petition No. 168 of 1876, on his file and proceed to dispose of it.

In each of the cases *Comalammal v. Rungasami Iyengar* (1) and *Rungasami Mudaliar v. Sirangan* (2) the suit had been adjourned on the special application of one of the parties, who was not ready with his evidence on the adjourned date. The cases fell, therefore, within section 148.

\* Corresponding with s. 158 of Act X of 1877.

†	Do.	s. 154	Do.
‡	Do.	s. 157	Do.
	Do.	s. 102	Do.
¶	Do.	s. 108	Do.

(1) 4 Mad. H. C. Rep 56.

(2) 4 Mad. H. C. Rep. 254.

## THE LAW OF MORTGAGE IN INDIA.

### SIMPLE MORTGAGES.\*

(In continuation of p. 22.)

The principle applicable to subsequent mortgagees has been extended on the authority of *Haran Chunder Ghose v. Denobundhoo Bose* to other persons possessing a qualified interest in the equity of redemption—lessees, for instance, holding under beneficial leases created subsequently to the mortgage.

In the case of *Byjnath Singh v. Goburdhun Lall* (24 W. R., 210) the purchaser under a sale by the mortgagee sought to set aside a lease created by the debtor subsequently to the mortgage. The lessee was not a party to the suit by the mortgage creditor, and the order directing the sale was made in his absence. It was contended on behalf of the purchaser under the execution that the lessee was not a necessary party to the suit, and that as the lease had been executed subsequently to the mortgage, it was not binding upon the purchaser. The Court, however, held otherwise being of opinion that the sale did not pass the property absolutely to the purchaser, and that the rights of the lessee who claimed an interest in the property could not be prejudiced by a sale under a decree made in his absence. It would, however, seem, although the point was not before the Court, that the purchaser, as assignee of the lien of the creditor, would have a right to insist upon the lessee's redeeming him, and on his failure to do so, to sell the property, the purchaser being entitled to a charge on the purchase money to the extent of the lien of the creditor who first put up the property to sale; and this would seem to be the only course open to him if the mortgage security was impaired by the creation of the term by the debtor. Under the law as it stood before the Full Bench ruling in *Haran Chunder Ghose's* case (23 W. R., 187), the sale by the mortgagee would have avoided the lease, and the right of the tenant would have been confined to the surplus proceeds of the sale. (*Brojo Kishore Dasgupta v. Mahomed Solim*, 10 W. R., 151. See also 7 W. R., 67, 19 W. R., 291.)

The security which is possessed by a mortgagee under a simple mortgage is, as I have endeavoured to explain, the right to sell the entire estate of the mortgagor as it existed at the date of the mortgage free of any charges on the property subsequently created by the debtor. The Calcutta High Court has not made any alteration in respect to the

\* Vide Tagore Law Lectures—1875-76, Lecture IV., by R. B. Ghose, pp. 107 to 112.

nature of the security to which the mortgagee becomes entitled under this form of mortgage, the rule laid down by the Court being a mere rule of procedure. The mortgagee has still the right to sell the entire estate of the mortgagor as it existed at the date of the mortgage, but he must take care to bring the puisne encumbrancers before the Court. Under a decree for sale obtained in their absence, the mortgagee can only transfer to the purchaser the benefit of his own lien and such interest, if any, as may be possessed by the debtor at the time of the institution of the suit.

As far as I have been able to discover, the ruling of the Calcutta High Court has not been followed in the other provinces, and a purchaser under a decree for sale obtains a complete title to the property although such decree may have been made in the absence of the puisne encumbrancers.

It is perhaps idle to expect that the case of *Haran Chunder Ghose v. Denobundhoo Bose* will be reconsidered. It is, however, doubtful if the Court did not in that case go too far in their anxiety to protect the interests of posterior encumbrancers. It is true that no person ought to be affected by an order made in his absence. But how is the puisne encumbrancer affected by the conversion of the estate into money? He may have a right to the surplus proceeds, and if that is secured to him, it is difficult to discover how he can be possibly prejudiced by a decree for sale. In every system of law in which the pledgee possesses the right of sale, what he sells is the property pledged to him, and not merely an undefined interest in the pledge, and no claimants upon the property posterior to the first pledgee can interfere with this right. (See the observations of Markby, J., in *Haran Chunder Ghose v. Denobundhoo Bose*.) I do not deny that very different considerations would arise if the mortgagee asked not for a decree for sale, but one for foreclosure. A decree for foreclosure stands upon a very different footing from a decree for sale, and any argument founded upon analogy would be sure to mislead.

There is besides another aspect of the question which I have not yet considered. It is very seldom, indeed, that an estate sold under an execution realizes an adequate price, and the encouragement offered to speculative purchasers is one of the principal sources of a good deal of litigation never very healthy, and frequently dishonest. It is not difficult to foresee that the result of the Full Bench ruling will be to aggravate the evil, and that both mortgagee and mort-

gagor will suffer by the sale of rights which must be to a great extent uncertain. The mischief is carefully guarded against in other systems of law by provisions which, while they secure to the creditor his just rights, prevent a needless sacrifice of the property of the debtor. Indeed, in this respect the interest of the debtor is identical with that of his creditor, as the object of both must be to secure the best possible price for the property. Under the law as it was understood before the Full Bench ruling to which I have had occasion to refer so frequently, this might be always accomplished by a sale by the first pledgee, who it was thought could pass the property free of all subsequent encumbrances. In the case of a puisne encumbrancer the result was, no doubt, different, as the sale by him was, as it still is, subject to all prior mortgages. It may, however, be suggested that even in this case it might perhaps be more convenient to allow the creditor to sell the estate, the preferential right of the prior mortgagee to the purchase money being secured to him. I am afraid that the suggestion may be regarded as somewhat wild, and I am free to confess that it is one which I should not have ventured to make if I had not found similar provisions in the law of France and other countries, whose jurisprudence is moulded on the Roman law. Broadly speaking (for I do not pretend to give a detailed account) a sale under an execution extinguishes all hypothecary rights or debts affecting the property, the right of the creditor being transferred to the purchase money. For this purpose the proceeds of the sale are deposited in the Court, and the creditors of the mortgagor are cited to appear and assert their claims. A proceeding is then adopted by which the respective priorities of the creditor are ascertained, and the proceeds divided according to the result of the investigation. This proceeding is called the *preferentia* and concurrence of creditors. Its object is to comprise the adjudication and assertion of those claims which are prior or preferred, as well as those which are concurrent. Each claim to be preferred or ranked concurrently is regularly brought to issue and debated, and the Court, by its sentence, declares the order in which the parties are to rank on the proceeds. (Code de Procéd. Civile, tit. 14; see also Burge's Foreign and Colonial Law, Vol. II. pp. 592-3; Vol. III., pp. 229-30.) This is a very simple and intelligent rule. It secures to the debtor a fair price for his property, and thus, as I have already explained, effectually protects the interests of the creditor. Trafficking in doubtful claims, one of the least interesting phases of litigation, finds no encouragement in such a system, while th

rights of the creditors are guarded with a jealousy not less scrupulous than that which we find in systems with which we are more familiar.

I have ventured to detain you with this slight sketch of the continental system of execution, not because I think there is much likelihood of the introduction of the principle into our own law, but because I think the student ought to have some acquaintance with the leading features of a system of jurisprudence which obtains in a large part of the civilized world. A too exclusive attention to any one system is likely to induce a habit of mind, which I am afraid is to be found in other persons besides the worthy English conveyancer, who thought that an attempt by the legislature to preserve contingent remainders without the intervention of trustees was about as absurd as an attempt to alter the laws of nature. Certain doctrines, true only in a limited sense, come to be regarded as fundamental principles of jurisprudence, and acquire such a firm hold that even the most gifted minds become intolerant of criticism. We have not to go far to seek for illustrations.

To return: As the law at present stands, the right which passes under a sale by a mortgagee is the entire interest which the mortgagor and mortgagee could jointly sell. Where the subsequent encumbrancers are parties, and the order for sale is made in their presence, the purchaser acquires a higher right which may be described as the entire interest which the mortgagee together with the puisne encumbrancers and the mortgagor could jointly convey. This is not distinctly stated in the judgment of the Court in *Haran Chunder Ghose v. Denobundhoo Bose* (23 W. R., 186), but there can be very little doubt that this would be so. In the case, however, of the second mortgagee, the interest which the purchaser acquires must be necessarily subject to the prior charge, and the presence of the first mortgagee as a party would not, I apprehend, make any difference. In this respect, as I have already said, the Full Bench has made no change in the law as it was previously understood. It is only in the case of a sale by the first mortgagee that the rule laid down in the earlier cases has been qualified by making the presence of the puisne encumbrancers essential to the passing of the estate absolutely to the purchaser. I have already explained that the doctrine has been extended to the case of a lessee, and there can be no doubt that it will be applied for the protection of all persons having an interest in the property, and not parties to the decree under which the property is sold.

I have said that the Full Bench ruling in *Haran Chunder Ghose v.*

*Denobundhoo Bose* has made no change as regards second mortgagees. The proposition, however, must be understood with the necessary qualification that the second mortgagee stands in the same relation to posterior mortgagees that the first mortgagee does to him, and that he is, therefore, under the same obligation towards them as the first mortgagee is towards him. Thus a purchaser under a sale by the second mortgagee, although he must in any event purchase subject to the rights of the first mortgagee, acquires a very different estate accordingly as the posterior mortgagees are parties to the decree or not. If the order for sale is made in their presence, the purchaser acquires the estate absolutely as against them, but if it be otherwise, the purchase is made subject to their right to redeem. I may also point out that although it has been always held that a purchaser of the mortgagor's interest is a necessary party to a suit by the mortgagee to enforce his charge, the rule was never extended to persons possessing a more qualified interest in the estate. The rights of these persons were recognized, so far as I am aware, for the first time, in *Haran Chunder Ghose v. Denobundhoo Bose* (23 W. R., 186).

I have said that a sale by the mortgagee conveys to the purchaser the entire interest which he and the mortgagor could jointly sell. I may, however, point out that this refers to the interest which they could jointly pass, not at the time when the property is sold, but at the time of the institution of the suit in which the decree under which the property is sold, is made. This is a necessary consequence of the doctrine *lis pendens*, which I shall have occasion to discuss in a subsequent lecture. I may also point out that the language of section 259 of the Civil Procedure Code is perhaps, in strictness, inapplicable to a sale by a mortgagee which takes place under a decree for sale, and not as in an ordinary execution. The right, title, and interest of the judgment-debtor, of which the section speaks, must be understood in a somewhat wider sense than the right possessed by the debtor at the time of the sale. As I shall have occasion to explain presently, the provisions of the Procedure Code with respect to executions are far from being clear on the rights of the mortgagee.

In connection with this subject I may mention that a question may arise, but which, so far as I am aware, has not been decided, as to the effect of a clause against alienation contained in a deed of mortgage. Such clauses are frequently found in Indian mortgages. I have already explained that ordinarily a clause against alienation does not prevent

the alienee from acquiring a title to the property. The covenant does not affect the thing itself, although in some cases the covenantor may render himself liable to an action for a breach of his contract. It would, however, seem that in the Civil law a clause against alienation by the mortgagor is allowed to bind the property itself, and a subsequent alienation is therefore void. In consequence of this doctrine the mortgagee is not bound to recognise any alienee of the property mortgaged to him, if there be a clause against alienation in the mortgage. It seems that in some of the earlier cases to be found in the books, the doctrine was carried by the Indian Courts further than equity or good conscience would seem to justify; but it may be a question whether, in the presence of such a stipulation, a decree obtained by the mortgagee, and a sale thereunder, although made in the absence of persons who acquired an interest in the property subsequently to the mortgage, would not pass an absolute title to the purchaser. In the absence of any distinct authority I do not venture to offer any opinion one way or the other. I simply call attention to the point as one which must not be taken to be concluded by the Full Bench ruling in *Haran Chunder Ghose's* case. (23 W. R., 186.)

It was thought at one time that a creditor whose debt was secured by a mortgage, was bound to proceed in the first instance against the property mortgaged to him, and that he could only proceed against other properties for the deficiency, should there be any. (*Brohmomoyee Dabee v. Boykunt Chunder Gangooly*, 5 W. R., Mis., 52.) It is, however, now settled that a mortgagee is under no such liability, and that he is at liberty to proceed against any property belonging to his debtor in the same way as an unsecured creditor, and this right is not qualified, although the decree should say that execution should be first had against the property pledged to the creditor, and afterwards against the person. It is always competent to the creditor to say, "I am content to rest upon the decree which I have obtained for the money due upon the bond, and to waive the right which I have as mortgagee." (*Fakeer Buksh v. Chutterdharee*, 14 W. R., 209; see also *Purmessaree Dossee v. Nobin Chunder Tavan*, 24 W. R., 305.) I need hardly point out that these observations do not apply to cases in which the creditor has lost his right either by the operation of the statute of limitations, or otherwise to proceed upon the covenant contained in the mortgage, and is restricted by the decree to proceedings against the land on which the debt is secured.

(To be continued.)

## CALCUTTA HIGH COURT.

*The 4th and 7th January and 11th February, 1878.*

PRESENT :

The Hon'ble Sir Richard Garth, Kt., Chief Justice, and the Hon'ble Mr Justice Markby.

MANICK CHUNDER DUTT (Plaintiff) *Appellant*,*versus*SREEMUTTY BHUGGOBUTTY DOSSEE (Defendant) *Respondent*.*Adoption of an only son—Its Invalidity—Sudras.*

The adoption of an only son is invalid. There is no authority for drawing a distinction between Sudras and other classes of Hindus upon this point.

Messrs. Bonnerjee and Apcar instructed by Babu P. C. Mookerjee for the Appellant.

Mr. J. D. Bell instructed by Messrs. Remfry and Rogers for the Respondent.

This was an appeal from a decision of Mr. Justice Kennedy, and the facts of the case are fully stated in the judgment of the Court, which was as follows:—

MANKEY, J.—In this case the plaintiff appellant claims to have been adopted by the late Raj Krishna Dutt in his life-time, and he brings this suit to have it declared that this adoption is valid, and that as such adopted son, he is sole heir to his adopted father. Mr. Justice Kennedy held, 1st, upon the authority of the case of Upender Lall Roy *vs.* Rani Prosonomoyee (1 Bengal Law Reports, Appellate Civil, page 221), that the adoption, if made, was invalid, because the plaintiff, at the date of the alleged adoption, was the only son of his father, and, 2ndly, that no adoption had in fact taken place.

The case comes before us upon appeal from this decision, and the first question for consideration is, whether the adoption of an only son is invalid under the Hindu Law? If this question is answered in the affirmative, there will be no necessity for deciding the second, which is one of fact. \* \* \*

(Then after a very full recapitulation of all the authorities bearing on the point, continued:—I think it will be seen that there are only four cases in which it is clear that the point properly arose, and was decided: the case of Nundram *versus* Kashee Panday in the Sudder Dewanny Adawlut; the



case of *Rajah Upendra Lall Roy versus S. M. Rani Pronomoyee* in this Court; the case of *Gamdar* in the High Court of Madras, and the case of *Neinballear versus Ramadivi* in the High Court of Bombay. Of these the two Bengal decisions are against the adoption; the decisions of Madras and Bombay support it. Of the English text writers *Colebrooke*, the two *Macnaghtens*, *Sutherland* and *Mr. Justice Strange*, all think the adoption illegal; there is only one English text writer, *Sir Thomas Strange*, on the other side, backed, no doubt, by the important but solitary opinion of *Jaganatha* amongst the Hindu text writers.

It appears to me, therefore, that the vast preponderance of authority, if not the entire authority in Bengal, is against the validity of the adoption of an only son: and if we were to hold the adoption of the plaintiff in this case to be valid, it would be necessary to overrule both the carefully considered decision of *Jackson, J.*, and *Dwarka Nath Mitter, J.*, and the equally careful decision of four Judges of the *Sudder Court*. This of course could only be done by a Full Bench. But we can only refer the case to a Full Bench if there is a conflict of authority, or if we ourselves differ from these decisions. Having gone through all the cases with great care, I do not think it can be said that there is any such conflict of authority in Bengal, as to justify us in referring the case to a Full Bench on that ground, and I am not prepared to refer the case to a Full Bench upon the ground that I myself think the adoption of an only son valid. On the contrary, on the best consideration I have been able to give to the authorities, I think such an adoption ought in Bengal to be held to be invalid, wherever the effect of holding such adoption to be valid would be to extinguish the lineage of the natural father, and so deprive the ancestors of the adopted son of the means of salvation.

Of course the question, whether this particular case can be taken out of the general rule is a wholly different one, and the appellant before us has contended that even if, as a general rule, the adoption of an only son be invalid still the rule does not apply to *Sudras*. No reason was given for excepting *Sudras* from the rule, and the principle upon which the rule is based, *viz.*, that a man should not be allowed to extinguish his lineage to the detriment, not only of himself, but of his ancestors, apparently applies just as strongly to *Sudras* as to other *Hindus*. The only decided case which lends any colour to a distinction in the case of *Sudras*, is that of *Mussumut Tikday versus Hurryall* above referred to. But upon an examination of that case I have come

to the conclusion that it is no authority for drawing a distinction between Sudras and other classes of Hindus upon this point. No doubt the parties in that case were Sudras and no doubt also this fact is noticed in the judgment, but in my opinion, for another purpose. The case came up upon appeal from the Zillah Court of Patna. It appeared that one Nowrunghee Lall had two wives. By the first, whose name is not given, he had a daughter, Nuseebun, but no son. The second wife, Mussumut Tikdey, was childless. Mussumut Tikdey survived her husband; the other wife died in his life-time. During his life-time Nowrunghee adopted his grandson, Hurrylall, the only son of his daughter Nuseebun as a *n kurta* or *krituna* son. After Nowrunghee's death Mussumut Tikdey brought a suit against Nuseebun and Hurrylall to recover, as heiress to her husband, certain property which had belonged to him, and it was in this suit that the question arose whether the adoption of Hurrylall was valid. In the judgment of this Court the Zillah Judge is stated to have held that, as "the family were Sudras no exception could be taken to the selection of an only son as a *kurta putro*." I have referred to the judgment of the Zillah Judge, and I do not find that he said this. What he did say was that a Sudra can adopt his sisters' son or daughters' son and for this there is good authority in the Dattaka Chundrika (Stokes H. L. 632), where Sudras are specially exempted from the rule which prohibits members of the other classes from adopting a daughter's or a sister's son. But the rule as to *krituna* adoptions is the same, as far as I am aware, for all the classes. It is a peculiar form of adoption which prevails in Mithila, whereby the adopted child does not cease to belong to the family of his natural father (see Sutherland and Stokes P. L. in the passages already cited), and is not confined to any particular class. In point of fact the zillah judge appears to have overlooked entirely that this was not a regular adoption, but a *krituna* one, and, relying solely upon the first opinion of Sir W. H. Macnaghten as quoted above, held that, as a general rule, the adoption of an only son could not be impeached. It was not until the case arrived in this Court that it was discovered that the adoption was in the *krituna* form, and I have no doubt that that was the substantial reason why, in this case, the adoption of an only son was held to be valid. It cannot be denied that there is some ground for saying that the rules of adoption are not so strictly applied to Sudras as to other classes of the community. One instance of relaxation has been just now mentioned, but I think we ought to be careful how we extend

the list of such exceptions and draw distinctions between the classes for which there is no direct authority in the Hindu Law. I do not find the slightest authority in any text book for saying that there is any distinction in this respect between Sudras and the other classes. If, therefore, the distinction exists at all, it rests solely upon the language used by the Judges in the case of *Mussumut Tikdey versus Hurrylall*. But as I have just now stated, I do not think that that decision, so far as it relates to the adoption of an only son, really proceeded upon any distinction between Sudras and other classes, and therefore, upon the ground that this is a general rule from which it is not shewn that Sudras are excepted, I think we ought to hold that for all classes of Hindus in Bengal an adoption is invalid wherever the effect of the adoption, if valid, would be to extinguish the lineage of the natural father; and to deprive the ancestors of the natural son of the means of salvation.

GARTH, C. J.—I quite agree in the conclusion arrived at in the very learned judgment of my brother Markby.

I think the weight of authority in Bengal is decidedly in favor of the invalidity of the adoption of an only son; and I see no sufficient ground for making any distinction in this respect in the case of Sudras.

The appeal will be dismissed with costs on Scale 2.

### CRIMINAL INSANITY.\*

Every person at the age of discretion is, unless the contrary be proved, presumed by the law to be "*compos mentis*" and to be accountable for his actions; in other words, it is the reason of man which makes him accountable for his actions, while the deprivation of reason acquits him of crime. For crime in our law is only punished as being voluntary, intentional, and malicious: it is not enough for conviction that the commission of the act be admitted, for then would numberless innocent acts which bear a supposititious resemblance to crime be punished as criminal. Given the admission that an act of this nature has been committed, the whole question of criminality will hang on the question—"Is will, intention, and malice present or absent?" If the answer proves that any one of these three was not present, crime is disproved. It behoves us then to see how far the proof that a man is mad affects the ordinary presumption that the above mentioned trio or some one of them is present and controlling the actions of every criminal. This brings us to the root of the whole matter, what is meant by "mad-

\* *Vide* 2, Knox, p. 712.

ness?" The question is of itself difficult to answer, but its difficulty has been enhanced tenfold owing to the different aspect in which it is looked at by lawyers and physicians. The former regard the effects rather than the cause, while the latter reverse this process, and look at the disease itself, not the conduct which the disease may induce. Thus a man may be medically insane, but legally sane; while the reverse of this theory is hardly possible.

Mr. Stephens describes legal sanity by a series of steps. He starts with the principle that there are some settled points relating to human conduct which admit of no doubt at all and which are assumed as the basis both of the administration of justice and of the transaction of all human affairs. One of these is that there is a normal state in which all human creatures act on the same principles, and that the infinite variety of conduct they display in that normal state arises from the different manner in which each of them applies these principles to facts, and in which the facts themselves are apprehended. All men shun pain—this is their normal state; but some are much, others hardly, affected by the prospect of future pain. So, again, all men may be presumed to possess a certain degree of knowledge by which their conduct is affected. When men act in this normal manner, when they are acquainted with the circumstances with which they are surrounded, when they have objects in view in their actions and regulate their conduct with reference to them and the general considerations which affect matters of that class, it may be predicated of them that they are sane. Sanity thus involves the presence of intention and will on all ordinary occasions, and an act done by a sane man when that act is one forbidden by law is rightly presumed to have been done with malice, and therefore to be a crime punishable by law.

There is one error which is sometimes fallen into, and which has, perhaps, not been sufficiently guarded against in the above explanations. Sanity has been shown legally to be a question of conduct. The resemblance of conduct to that of other men is not necessarily devoid of legal sanity, because it is generic and not specific. An act may be accompanied with ever so much ignorance, vice, or folly, and yet be legally sane. If ordinary motives are present, means adapted to the end and the like, the act is no longer one done without will, intention, or malice; and, however incomprehensible or unnatural, it is still an act done by a legally sane man. Motive is a false standard by which to judge sanity or insanity, for the maddest act is not devoid of a motive: we must go

further back than this, and judge the knowledge that co-existed with the motive: it is this which stamps a motive as mad or sane.

Motive presumes will and intention, and this reduces our question into narrower limits:—how far does the proof that a man is mad rebut the presumption of malice? To answer this we must first know what malice is.

“In the legal acceptance of the word, malice is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another.” (Campbell, C. J.) If it can be proved that a person who did the act *could not know* that the act he did was wrong, it will be impossible for one moment to impute to him malice. The question, “could he know that his act was wrong,” is better than the question “did he know that the act was wrong,” for the latter would lead us into another “ignorance of the law.” The fact that a man does know a criminal act to be condemned is generally inferred from his possession of the ordinary means of knowledge by such mental power, composure and information as are necessary to enable him to understand the meaning of common propositions and the immediate and ordinary consequences of actions. If he has these qualities, he is no longer insane, and the issues of the case are quite new. If a man *could* know, he must be treated as sane if not an insane.

It is often difficult from the evidence adduced to decide whether a man could or could not know that he was doing what was wrong, more especially when the plea raised is not that of total, but that of partial insanity or of delusion.

Partial insanity is the more important of the two. In Mr. Stephens’s opinion, it does not differ for legal purposes from the existence of insane delusions on particular subjects, which leave the thoughts unaffected on other subjects. “How does the existence of such a disease,” says he, affect the criminality of a given act? It may do so in two ways. In the first place, “it may be evidence to disprove the presence of the kind of malice required by the law to constitute the particular crime of which the prisoner is accused. A man is tried for wounding with intent to murder. It is proved that he inflicted the wound under a delusion that he was *breaking a jar*.” The intent to murder is disproved, and the prisoner must be acquitted, but if he (*would have*) no right to break the supposed jar, he might be convicted of an unlawful and malicious wounding. Wrongfully to break a jar is a malicious act; and if a man wounds another in so doing, he wounds him unlawfully and maliciously. In

other words, the delusion must, for the purposes of the trial, be taken to be true."

"This, however, is a rare and comparatively unimportant application of the existence of partial insanity or insane delusion. Its great importance is that it is evidence to show that the prisoner's mind was so disturbed that he did not know that the act was wrong, that he could not form a reasonable judgment on it. The application of this evidence to particular facts is a matter of the greatest nicety. Illustrations show this better than generalities. A professional highway robber shoots a man and robs him, buries the body in a ditch, disguises and hides himself, and flies from justice. It is proved that he had an insane delusion, that his little finger had five joints in it. If the evidence stopped there, it would afford as little excuse as if he had mistaken his victim's name, yet it would prove a clear case of the co-existence of insane delusion and criminal responsibility. The concealment and flight would be strong evidence to show that he knew the act was wrong. If he waited to commit the murder till no one was by, it would be strong evidence that he could have helped doing it at all, besides, the course of the man's life, which could probably be given in evidence on such an occasion, would go far to show that the act was sane and malicious."

"Circumstances, however, might exist, which would convert the delusion specified into strong evidence against malice. Suppose it came on after some violent disease, and was accompanied by great extravagance of conduct, and by other circumstances tending to show that the person accused had committed the acts in question not with any knowledge of their character, but because before he went mad he led a life of crime, and was thus led to violence and plunder by old associations,—this would be strong evidence against the existence of malice. By supposing new facts on the one side or the other, any degree of difficulty may be introduced into the decision of particular cases, though the question to be decided remains unaltered."

Will and intention may be present, and a man not have the power to control them. How far is he to be held responsible for what he could not help? This will lead us to consider, 1st, Impulsive insanity; and 2nd, *Dementia affectata*, a perfect though temporary frenzy or insanity voluntarily contracted.

#### *Impulsive Insanity.*

"It is said that on particular occasions men are seized with irra-

tional and irresistible impulses to kill, to steal, or to burn, and that under the influence of such impulses they sometimes commit acts which would otherwise be most atrocious crimes. The only question which the existence of such impulses can raise in the administration of criminal justice is, whether the particular impulse in question was irresistible as well as unresisted. If it were irresistible, the person accused is entitled to be acquitted, because the act was not voluntary and was not properly his act; if the impulse was resistible, the fact that it proceeded from disease is no excuse at all. If a man's nerves were so irritated by a baby's crying that he instantly killed it, his act would be murder. It would not be less murder if the same irritation and the corresponding desire were produced by some internal disease. The great object of the Criminal Law is to induce people to control their impulses, and there is no reason why, if they can, they should not control insane impulses as well as sane ones. The proof that an impulse was irresistible depends principally on the circumstances of the particular case. The commonest, and probably the strongest cases, are those of women who, without motive or concealment, kill their children after recovery from childbed."

The most striking illustration of impulsive insanity in India is that of running "a-muck" ("amok"), and is thus commented upon by Dr. Chevers in his work on Medical Jurisprudence:—

"On the 22nd September 1857, Moun-g-Wot-Kai seized a *dào*, killed four persons, and wounded four others, one of whom subsequently died. The prosecutor said that the prisoner was a good man until he lost his wife; that since last August he had appeared not sane, but never quarrelled with any person. Those whom he attacked were the family in whose house he lived. The woman of the house, his own sister, who was one of the sufferers and died in hospital, said that they had had no quarrel: he had no reason for doing what he did. She said he had been ailing for two or three months, and was silly: nevertheless, she said he did his work well, the same as the others. The Civil Surgeon had excellent opportunities of examining and watching the prisoner, who had no fits of insanity. He had every reason to consider him sane though a low animal of morose disposition, and that he had run "a-muck" which Mughas, like Malays, frequently do. In his confession to the Magistrate the prisoner said he was suddenly seized with a frenzy when he first cut "Kia-oung" and his sister; that he then went out flourishing his sword, or *dào*, and wounded the others. The doing this he said gave him plea-

sure. He said he had been ailing, and must have been mad. No evidence of a quarrel or cause for this crime could be adduced."

"The Judges of the Court of Nizamut Adawlut remark as follows :—Mr. D. J. Money.—"The charges against the prisoner are clearly established upon the fullest and strongest evidence. He has been found guilty of the wilful murder of four persons, and of wounding as many more with intent to murder. The case is a horrible one." The prisoner ran-a-muck, as it is called, under the possession of something like a satanic influence. He says himself he was seized with a frenzy, and the atrocious act gave him pleasure, that he had been ailing, and must have been mad. There was no motive for the murders. He acted upon a sudden, and, from his own account, an irresistible impulse. The case is rendered difficult by the opinion pronounced by the Civil Surgeon regarding the prisoner's mental condition. The medical evidence shows that the prisoner had evinced no symptoms of insanity since the fatal acts were committed. There is no evidence on the record to prove that he was insane before or at the time of their commission. The Civil Surgeon, however, considers him 'a low animal' of morose disposition ; and the Officiating Commissioner, on the ground of his being of a low order of intellect, and with reference to the decision of this Court of the 30th September 1856, in the case of Eshoree Dassea (*vide supra*, p. 777), recommends that capital punishment should be remitted, and the prisoner should be sentenced to imprisonment for life in banishment."

"I cannot assent to this recommendation. There is no question, I admit, in the whole range of Criminal Jurisprudence more difficult to decide than the question of responsibility which attaches to the commission of a sudden motiveless murder. In most cases the Court is relieved from the difficulty by the medical evidence ; but when such evidence shows, as the result of careful inquiry, that no symptoms of insanity have been traceable since the commission of the act, and leaves it to be inferred that the prisoner was sane,—that is, conscious of right and wrong, and of the consequences of the act when he committed it : while, on the other hand, there is the glaring insanity of the act itself, and the statement of the prosecutor that the prisoner was mad, some years before,—I confess it requires a most careful examination of the case, and the utmost caution in weighing the medical evidence, in order to arrive at a safe and just conclusion. With reference, however, to the prisoner being a low animal, or of a low order of intellect, it would, I think, be as dangerous as it would be unjust, in the consideration of



such a question, to admit of degrees of insanity, and to allow the extent of the mental and moral consciousness to be the measure of the punishment. The criminal, in every such case, must be either out of his mind, and wholly irresponsible, or he had the power to resist the homicidal impulse, and did not, and is answerable for the consequences. The Court can admit of no middle ground in judging of the criminality of the act, and the responsibility attached to it. In the latter case, the prisoner would justly suffer the extreme penalty of the law; in the former, being irresponsible, he should be acquitted, and confined as a madman, until he is pronounced to be sane, and it would be safe to let him loose."

"From the well-known case of Macnaghten, tried in the House of Lords, 1843, Taylor, in his work on Medical Jurisprudence (p. 854, Fifth Ed.), deduces the inference that a complete possession of reason is not held to be essential to constitute the legal responsibility of an offender; and a little further on, referring to Jameson's Lectures on Insanity, he stated, the 'worst lunatics have an abstract knowledge that right is right, and wrong, wrong;' but, in true insanity, the voluntary power to control thought and actions is impaired, limited, or overruled by insane motives. A lunatic may have the power of distinguishing right from wrong, but it is contended, from a close observation of the insane, that he has not the power of choosing right from wrong. A criminal is punishable, not merely because he has the power of distinguishing right from wrong, but because he voluntarily does the wrong, having the power to choose the right."

"Was the prisoner in this case sufficiently sane to be criminally responsible? There is no evidence to prove that he was mad. He was not suffering from any particular delusion of mind. In judging, therefore, of the crime as the result of homicidal mania, it would be a dangerous doctrine to judge only of the insanity of the prisoner from the insanity of the act. Under this reasoning, and upon such ground, almost every crime might be palliated or excused. Absence of motive alone is not a safe criterion. There must be other evidence of insanity before a criminal can be pronounced irresponsible. See Taylor upon this point, in his work cited above. The sentence passed by this Court in the case cited by the Officiating Commissioner was transportation for life, on the ground of the prisoner possessing a low intellect."

"The sentence now recommended is based upon this precedent. If I could be persuaded that low intellect was a mental condition which gave

the possessor invariably less control over his actions than a higher degree of intellect, irrespective of moral feeling, I might come to the conclusion that he was necessarily less responsible; but still there would be some responsibility; and, if responsible at all, the law must take its course. But as in judging of the act, I do not think the punishment should depend upon the degree of insanity, so also I would not allow the responsibility of the act to be affected by a higher or lower order of intellect. I think the prisoner in this case, whatever his intellect was, had the power to control the homicidal impulse; and, as instead of resisting it, he indulged in it because it gave him pleasure, he justly deserves the extreme penalty of the law. I would sentence him, therefore, to suffer death."

*Dementia affectata* comes oftener, perhaps, under the notice of Courts in India than any other form of legal criminal insanity. The broad rule in this form of insanity is that, when self-caused, it is no excuse for crime. If this frenzy, however, have become habitual and confirmed, and a criminal act is done by a man while under the influence of it, he will stand or fall by the answer to the question—could he help doing it? Thus, Hale says, a man will not be liable to be punished for any crime perpetrated under the influence of insanity which is habitual and fixed, though caused by frequent intoxication, and originally contracted by his own act.

Not much removed from the above in the well-known plea of moral insanity of which Mr. Stephens says :—

"Moral insanity is said, by those who use the phrase, to consist in a specific inability to understand or act upon the distinction between right and wrong, a sort of moral colour-blindness, by which persons, sane in all other respects, are prevented from acting with reference to established moral distinctions. Whether such a disease exists, and whether particular people are affected by it, are, of course, questions of fact like any others. No doubt if its existence in a particular case were proved, it would be a ground for acquitting the prisoner, as it would disprove malice. So it might be a good defence to admit that a man meant to murder another; that he had loaded a pistol to shoot him, and pointed it at his head; but to contend that it was fired by a sudden involuntary convulsion of the necessary muscles and not by the prisoner's will, the difficulty is to get the Jury to believe it. The evidence given in support of the assertion that a man is "morally insane," is, generally speaking, at least as consistent with the theory that he was a great fool

and a great rogue, as the theory that he was the subject of a special disease, the existence of which is doubtful."

The leading case on the question of legal insanity is that of *R. v. Macnaghten*. In it the following questions were put, and the following answers received from the English Judges :—

"1st.—What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit?"

"2nd.—What are the proper questions to be submitted to the Jury when a person, alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder for example), and insanity set up as a defence?"

"3rd.—In what terms ought the question to be left to the Jury as to the prisoner's state of mind at the time when the act was committed?"

"4th.—If a person, under an insane delusion as to the existing facts, commits an offence in consequence thereof, is he thereby excused?"

"5th.—Can a medical man, conversant with the disease of insanity, who never saw the prisoner previous to the trial, but who was present during the trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under, and what, delusion at the time?"

To these questions the Judges (with the exception of *Maule, J.*, who gave on his own account a more qualified answer) answered as follows :—

To the *first* question :—"Assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is

nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression we understand your Lordships to mean the law of the land."

To the *second* and *third* questions:—"That the Jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the Jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the Jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put as to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely, and exclusively with reference to the law of the land, it might tend to confound the Jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the Jury, whether the party accused] had a sufficient degree of reason to know that he was doing an act that was wrong; and this course, we think, is correct, accompanied with such observations and explanations as the circumstance of each particular case may require."

To the *fourth* question:—"The answer to this question must, of course, depend on the nature of the delusion; but making the same assumption as we did before, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the in-

fluence of his delusion, he supposes another man to be in the act of attempting to take away his wife, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased has inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

And to the *last* question:—"We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the Jury to decide; and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

In conclusion, reference must be made to the question, what treatment is to be pursued towards one supposed to be insane who has committed the crime, and is sent for examination to the Civil Surgeon with regard to his state of mind?

"Here it, of course, becomes the duty of the Civil Surgeon at once to endeavour to distinguish how much of any disorder of the intellectual faculties which the culprit may present is dependent upon physical, and how much upon mental, causes. He has either been brought in, very shortly after the deed of violence, heated, panting, and almost wild with rage or terror; or pale, tremulous, prostrated, and horror-stricken; or where the act has been done at a distance, he has been hurried in on foot, from thannah to thanuah, perhaps a distance of from thirty to fifty miles, exposed to the scorching mid-day sun, and to the night cold, roughly treated, and, in short, the subject of nearly all those causes which would most tend to unsettle for a time the steadiest intellect; he, in fact appears before the medical officer more like a wild beast dragged from jungle, than the quiet-mannered, commonplace native that he ordinarily is. These circumstances being carefully looked to and discriminated, the medical officer may—upon observing that his eyes are inflamed, his head hot, his tongue foul, and his pulse excited, and, upon learning that he is sleepless at night—feel disposed to exercise the remedial portion of his art, and to prescribe purgatives, nauseants, sedatives, low diet, and cold effusion. I allude especially to this point, as I have

seen such a course inconsiderately adopted, under such circumstances, by men of experience and judgment; have felt myself bound to counsel against it. In these cases, unless the physician be convinced, either that treatment is necessary to save the individual's life (which will very rarely, indeed, happen), or that the experiment of treatment will aid him in forming or confirming his diagnosis (a dangerous course, which can only be undertaken by those who possess unusual tact in the investigation of such cases), it is always safer and fairer towards the subject of our scrutiny to leave his case untreated, under the most careful watching. In fact, with regard to food, lodging, dress, opportunities of ablution, &c., he should be permitted to remain, as far as the fact of his being in a jail will admit of, as nearly as possible under the circumstances to which he has been accustomed. Indeed, if it can be clearly proved that he has been in the habit of drinking spirits or of using drugs, these should be allowed him, in moderate quantities, with very cautious observation of their effects. Under these circumstances, it may fairly be expected that the effects of intoxication, whether by sharab or ganja, will gradually pass off, and that all unwonted excitement, the result of terror or ill-usage, will be calmed down; but cerebral irritation, depending upon actual vascular changes, will not be removed: fever will run its course (and may be allowed to do so until the medical man has fully recognized its presence, and has judged whether it did or did not probably exist previous to the crime). The true mania will probably remain unaffected, except in character and degree. It appears to be generally stated, by those medical men who conduct asylums near large towns, where recent cases are brought in at once, that instances of acute mania are remarkably common, and are in a very large proportion of cases highly remediable. It is only after the trial that the physician can be justified in treating the criminal lunatic; it can never be an act of justice nor of humanity to place one who has committed a maniacal act sane before a Jury who are to try him for murder. I confidently believe that there are some who have been hanged in consequence of this *nimia diligentia medicorum*."

"The most difficult class of cases met with in this country is probably that in which individuals, of dividedly and conspicuously weak intellect, but gifted with a degree of cunning almost compensatory to the higher faculties in which they are deficient, having been made tools of by dangerous persons in effecting their nefarious designs, fall into the hands of the authorities, who demand reports upon the state of their

minds as accountable beings. Here, however, the contest between the intellect of the Surgeon and that of the idiot, should, of course, terminate in favor of the former, especially as these impostors, if watched sufficiently long, rarely fail to neglect or over-act their parts."

"The chief modes of judging of the insanity or sanity of natives is by observing whether they adhere to their rules of caste, or the customs laid down in their religion; by having surveillance maintained upon them by the Native Doctors and by their fellow-prisoners (an unsafe practice); by watching them when they are unconscious of observation; by noticing whether they are sleepless by night, and also by applying most of the other plans of investigation which we have recourse to in England. Dr. Kenneth McLeod has recently told me of a case in which a prisoner feigning insanity and dumbness, was detected by the administration of chloro-form."

"The minds of natives are not free from tendency to religious monomania. Indeed, constant brooding upon the laws and fables of a wild and bloody superstition, must, unquestionably, sometimes unhinge the narrow intellects of these *wretched fanatics*. Still, where the crime assumes the character of any one of a set of barbarous practices, which it has long been the steady purpose of our lawgivers to extirpate from the land, and especially where, even as in the case of human sacrifice, the perpetrator cannot deny that, even upon his own explanation of his motives, he has committed the act with a direct view to his own advantage, it is evident that a plea of insanity must not be met with any yielding of misplaced compassion."—*Chevers*.

### THE SPECIFIC RELIEF ACT, BY M. C. MITRA, M. A., B. L.

Baboo Mahendra Chandra Mitra, M. A., B. L., a distinguished pleader of the Hooghly Judge's Court, has very lately published an edition of the Specific Relief Act (Act I. of 1877) with copious notes illustrated by Indian as well as English Cases with an elaborate Index and an Appendix containing the objects and reasons as stated by Sir Arthur Hobhouse in introducing the bill into Council. This is an excellent work. Its printing and get up is very nice. No one who reads the

book will have any doubt that the author has bestowed considerable labor on this his first production. It contains many judicious remarks, and the style of the notes are neat, clear and precise. It is difficult to speak too highly of the skill which has been shown in the selection and arrangement of the rulings, both English and Indian, under the different sections of the Act, which clearly explain and illustrate them. We hope this very useful work shall find place in the library of every professional man. We need not here mention that the success of this journal has encouraged our countrymen to edit law books, a business formerly monopolized by European barristers-at-law. And we have reasons to hope that within a very short time, the barristers will be relieved of their much onerous work of annotating and publishing law books which henceforth they will willingly leave to natives, who, as Lord Macaulay observed, are "so sharp legal practitioners, that no class of human beings can bear a comparison with them," and who therefore no doubt can make good digests and annotations useful to the bench, the bar and the public at large. In order to enable our readers to form an opinion of their own, we make the following extracts from the work under notice :—

### "PART III.

## OF PREVENTIVE RELIEF.

### CHAPTER IX.

#### OF INJUNCTIONS GENERALLY.

52. Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.

Preventive relief how granted.

53. Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Pro-

Temporary injunctions.

cedure.



A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit :  
 Perpetual injunctions. the defendant is hereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

## CHAPTER X.

### OF PERPETUAL INJUNCTIONS.

54. Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.

When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II. of this Act.

When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases (namely) —

(a) where the defendant is trustee of the property for the plaintiff ;

(b) where there exists no standard for ascertaining the actual damage caused or likely to be caused by the invasion ;

(c) where the invasion is such that pecuniary compensation would not afford adequate relief ;

(d) where it is probable that pecuniary compensation cannot be got for the invasion ;

(e) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

EXPLANATION.—For the purpose of this Section a trademark is property.

### *Illustrations.*

(a.) A lets a certain land to B, and B contracts not to dig sand or gravel thereabout. A may sue for an injunction to restrain B from digging in violation of his contract.

(b.) A trustee threatens a breach of trust. His co-trustees, if any, should, and the beneficial owner may, sue for an injunction to prevent the breach.

(c.) The directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the shareholders may sue for an injunction to restrain them.

(d.) The directors of a fire and life insurance company are about to engage in marine insurances. Any of the shareholders may sue for an injunction to restrain them.

(e.) A, an executor, through misconduct or insolvency, is bringing the property of the deceased into danger. The Court may grant an injunction to restrain him from getting in the assets.

(f.) A, a trustee for B, is about to make an imprudent sale of a small part of the trust-property. B may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief.

(g.) A makes a settlement (not founded on marriage or other valuable consideration) of an estate on B and his children. A then contracts to sell the estate to C. B or any of his children may sue for an injunction to restrain the sale.

(h.) In the course of A's employment as a vakil, certain papers belonging to his client, B, come into his possession. A threatens to make these papers public, or to communicate their contents to a stranger. B may sue for an injunction to restrain A from so doing.

(i.) A is B's medical adviser. He demands money of B which B declines to pay. A then threatens to make known the effect of B's communications to him as a patient. This is contrary to A's duty, and B may sue for an injunction to restrain him from so doing.

(j.) A, the owner of two adjoining houses, lets one to B, and afterwards lets the other to C. A and C begin to make such alterations in the house let to C as will prevent the comfortable enjoyment of the house let to B. B may sue for an injunction to restrain them from so doing.

(k.) A lets certain arable lands to B for purposes of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, B threatens to sow the lands with seed injurious thereto and requiring many years to eradicate. A may sue for an injunction to restrain B from sowing the lands in contravention of his implied contract to use them in a husbandlike manner.

(l.) A, B, and C are partners, the partnership being determinable at will. A threatens to do an act tending to the destruction of the partnership property. B and C may, without seeking a dissolution of the partnership, sue for an injunction to restrain A from doing the act.

(m.) A, a Hindu widow in possession of her deceased husband's property, commits destruction of the property without any cause sufficient to justify her in so doing. The heir expectant may sue for an injunction to restrain her.

(n.) A, B, and C are members of an undivided Hindu family. A cuts timber growing on the family property, and threatens to destroy part of the family-house and to sell some of the family-utensils. B and C may sue for an injunction to restrain him.

(o.) A, the owner of certain houses in Calcutta, becomes insolvent. B buys

them from the official assignee and enters into possession. A persists in trespassing on and damaging the houses, and B is thereby compelled, at considerable expense, to employ men to protect the possession. B may sue for an injunction to restrain further acts of trespass.

(p) The inhabitants of a village claim a right of way over A's land. In a suit against several of them, A obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues A for obstructing his alleged right of way over the land. A may sue for an injunction to restrain them.

(q) A, in an administration suit to which a creditor, B, is not a party, obtains a decree for the administration of C's assets. B proceeds against C's estate for his debt. A may sue for an injunction to restrain B.

(r.) A and B are in possession of contiguous lands and of the mines underneath them. A works his mine so as to extend under B's mine, and threatens to remove certain pillars which help to support B's mine. B may sue for an injunction to restrain him from so doing.

(s.) A rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier, B. B may sue for an injunction restraining A from making the noise.

(t) A pollutes the air with smoke so as to interfere materially with the physical comfort of B and C, who carry on business in a neighbouring house. B and C may sue for an injunction to restrain the pollution.

(u.) A infringes B's patent. If the Court is satisfied that the patent is valid and has been infringed, B may obtain an injunction to restrain the infringement.

(v.) A pirates B's copyright. B may obtain an injunction to restrain the piracy, unless the work of which copyright is claimed is libellous or obscene.

(w.) A improperly uses the trademark of B. B may obtain an injunction to restrain the user, provided that B's use of the trademark is honest.

(x) A, a tradesman, holds out B as his partner against the wish and without the authority of B. B may sue for an injunction to restrain A from so doing.

(y.) A, a very eminent man, writes letters on family topics to B. After the death of A and B, C, who is B's residuary legatee proposes to make money by publishing A's letters. D, who is A's executor, has a property in the letters, and may sue for an injunction to restrain C from publishing them.

(z.) A carries on a manufactory, and B is his assistant. In the course of his business A imparts to B a secret process of value, B afterwards demands money of A, threatening, in case of refusal, to disclose the process to C, a rival manufacturer. A may sue for an injunction to restrain B from disclosing the process.

"A writ of injunction may be described to be a judicial process, whereby a party is required to do a particular thing or to refrain from doing a particular thing, according to the exigency of the writ. The most common form of injunction is that which operates as a restraint upon the party, in the exercise of the real or supposed rights, and is sometimes called 'the remedial writ of injunction.' The other form commanding an act to be done is sometimes called 'the judicial writ,' because it issues after a decree, and is in the nature of an execution to enforce the same; as for instance, it may contain a direction to the party-defendant

to yield up, or to quit, or to continue the possession of, the land or other property which constitutes the subject matter of the decree, in favor of the other party. The object of this process, which is most extensively used in equity proceedings, is generally preventive and protective rather than restorative; although it is by no means confined to the former. It seeks to prevent a meditated wrong more often, than to redress an injury already done."—Story, Eq. Juris., Secs. 861 and 862.

*Illustration (a)*—*City of London vs. Pugh*, 4, Bro. P. C., 395.

(c)—*Vide*, Story, Eq. Juris., Sections 854, 896 and 904. As the object of such bills is to prevent multiplicity of suits by determining the right of the parties upon issues directed by the Court, if necessary, for its information, instead of suffering the parties to be harrassed by a number of separate suits, in which each suit would only determine the particular right in question between the plaintiff and the defendant in it, such a bill can scarcely be sustained, where a right is disputed between two persons only, until the right has been tried and decided upon at law."—Mitf. Eq. P. C., by Jeremy, 145, 146.

*Illustration (f)*.—*Vide*, Story, Eq. Jur. Sec. 954; also *Anon*, 6, Madd., 10.

*Illustration (h)*.—*Vide*, Story, Eq. Jur. Sec. 945.

*Illustration (j)*.—*Palmer vs. Pacl*, 2, L. J., Ch. 154.

*Illustration (k)*.—*Pratt vs. Brett* 2, Mad., 62.

*Illustration (l)*.—*Miles vs. Thomas*, 9, Sim., 609.

*Illustration (m)*.—*Vide*, B. L. R., Sup. Vol., p. 10.

*Illustration (n)*—*Vide*, *J. Stalkart vs. Gopal Panday*, 20, W. R., 168. *Held*, that the plaintiff was entitled to a perpetual injunction directed particularly to defendant's trespass, and the defendant ought to be restrained from excluding plaintiff from joint possession, and from taking, retaining or giving exclusive possession of the land.

*Illustration (o)*.—*Hodson vs. Duce*, 2, Jur., N S, 1014.

*Illustration (p)*.—*Weal vs W. Middlesex Water-works Co.*, 1, Jac. & W., 358

*Illustrations (r) and (s)*.—The Court will interpose injunction to stay a nuisance which is serious and permanent, and will have reference not only to its present but to its prospective effect upon the comfort of the occupier of the land as well as its permanent value.—Story, Eq. Juris., Sec. 929 d.

The subject of the right of riparian owners to relief in equity against diversion and corruption of the water.—*Holsman vs. The Boiling Spring Bleaching and Co.*, 1, McCarter, 335. Where a mere trespasser digs into and works a mine to the injury of the owner, an injunction will be granted.—7, Ves., 308; 6, Ves., 147; 17, Ves., 281. Where an adjoining owner's lands fall in by excavation 50 ft. deep for the purpose of removing earth to make bricks, an injunction was granted.—19, Bairbour, 380. It has been held that an owner of lots upon a street upon which a railway is about to be constructed, which will cause special damage beyond what the company have acquired the right to do under their charter, may maintain a suit to enjoin such construction. But the mere fact that property adjoining a street will be damaged by the grade of the street, gives the owner no cause of action.—Story, Eq. Juris., Sec. 929 a. Injunctions to prevent obstruction to ancient lights by the

erection of buildings are common.—S. C., 6, Jur., N. S., 1109; and *Lackersteen vs. Tarucknath Poramanic*, Cor. Rep., 91. How far discharging sewage into a stream is a nuisance—*Holsman vs. B. S. B. Co.*, 1, McCarter, 335; also *Goldsmith vs. Tunbridge Wells Com.*, 12, Jur., N. S., 308. Informations in equity have been maintained against a public nuisance by stopping a highway.—Story, Eq. Juris., Secs. 923 and 924.

*Illustration (r).*—Where an attorney sold his business and covenanted with the purchaser that he would not practice as a solicitor or an attorney in any part of Great Britain, for the space of twenty years, without the purchaser's consent, the Court granted an injunction to restrain the solicitor from infringing his covenant.—*Whittaker vs. Howe*, 3, Beav., 383; *Giles vs. Hart*, 5, Jur., N. S., 1381. The Court will not be prevented to grant an injunction when a penalty imposed upon a solicitor's clerk for breach of an agreement not to practise within a certain distance of his employer's place of business, is clear in record—*Howard vs. Woodward*, 34, L. J., Ch. 47. Where the lease of a house and the good-will of the trade of a cheese-monger were sold by a word of mouth, upon an understanding that the vendor should not set up the same trade in the same street, the Court of Chancery restrained the vendor from infringing the oral contract.—Addison on "Contracts," p. 1104. *Vide, Lord Lonsdale vs. Curwen*, 3, Bligh., A. C., 308.

*Illustration (s).*—Where the plaintiff's house was so near the church that the five o'clock bell rung in the morning disturbed her, and it was agreed by her and the church-wardens and parishioners in vestry assembled, that a cupola and clock should be erected by her on the church, and that in consideration of this being done, the five o'clock bell should not be again rung during her life, and the cupola and clock were accordingly erected, and the bell was silenced for two years, after which time it was rung again, the Court of Chancery held that the agreement was binding upon the parish, and decreed an injunction against the ringing of the bell.—*Martin vs. Nutkin*, 2, P. Wms., 266; *Vide, also Morris vs. Colman*, 18, Ves., 437. The parish bell was prevented to be rung in the following cases:—

*Harmer vs. Plane*, 14, Ves., 132; *Hogg vs. Kirby*, 8, Ves., 223, 224; *Wilkin vs. Aikin*, 17, Ves., 424; *Universities of Oxford and Cambridge vs. Richardson*, 6, Ves., 705, 706; *Colburn vs. Simms*, 2, Hare. Rep., 543, 553; *Sweet vs. Cater*, 11, Sim., 572; *Simms vs. Marryat*, 7, Eng. Law and Eq. R., 330. Consult also Story, Eq. Jur., Sections 930, 931, 942, 933, 934, 935, 936.

*Illustration (u).*—*Barefield vs. Nicholson*, 2, Sim. & Stu., 1; Addison on "Contracts," pp. 121, 122, 1104.

*Illustration (w).*—A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practise such a deception nor to use the manner which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or indicia by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person.—*Perry vs. Truefett*, 6, Beavan R., 66; *Farina vs. Silverlock*, 6, De G. M. & G., 214; Also *Hunt vs. Maniere*, 34, Le J., Ch. 142; *Ewing & Co. vs. Grant Smith & Co.*, Hydes Reports, Vol. II. p. 185.

*Illustration (y).*—The publication of letters in violation of a trust or confi-

dence founded in contract, or implied from circumstances, is restrained.—*Lord Percival vs. Phipps*, 2, Ves. & Beam., 19, 21. The question was raised whether a literary or a scientific lecture can be published without authority.—*Abernetty vs. Hutchinson*, 3, Law Journal, Reports Chancery, 209. No person has a right to pirate a dramatic performance. An injunction will be granted against publishing a magazine in a party's name, who has ceased to authorize it.—*Hogg vs. Kirby*, 8, Ves., 215; Maule, J. observed:—"We cannot say that a fair account of proceedings, which must be public and not *ex parte* is not, generally speaking, a justifiable publication. I say, generally, not universally, for matters may take place in Courts of Justice, the publication of which would be injurious to the public."—*Hoare vs. Silverlock*, 9, C. B., 20. "The publication of *ex parte* proceedings, even of a civil nature, when they are injurious to the characters of individuals, cannot be justified."—Starkie, "Law of Libel and Slander," Vol. I, p. 265.

*Illustration (x)* is *Routh vs. Webster*, 10, Beav., 561.

An injunction was refused when sought against a chemist for selling a quack medicine under a false and colourable representation that it was the medicine of the plaintiff, who had not any such medicine of his own with which the quack medicine would come in competition.—*Clark vs. Freeman*, 11, Beav., 112. "In a moral view the publication of such letters, unless and in cases where it is necessary to the proper vindication of the rights or conduct of the party against unjust claims or injurious imputations, is perhaps one of the most odious breaches of private confidence"—Story, Eq. Juris., Sec. 946.

*Illustration (z)*.—*Morrison vs. Moat*, 25, Juris., 789.

A suit for injunction to restrain sub-letting—7, Dom. H. C. R., A. C. J., p. 169. Where a trespass of a continuing nature has been committed by the defendant, but has been discontinued before suit brought, the Court will not interfere by injunction to restrain the defendant from continuing such trespass, merely because the plaintiff entertains vague apprehensions that the trespass may be recommenced.—8, B. H. C. R., O. C. J., p. 85. An injunction to prevent waste.—2, B. H. C. R., A. C. J., p. 98; also consult *Prossono Moyce Dassay, Appellant*, 14, W. R., 409.—Injunction to deposit money in Court under Sec 92 of Act VIII of 1859—16, W. R., 297. An injunction in respect of property cannot be maintained after a claim is dismissed or pending in appeal.—14, W. R., 384.

Where a decree-holder agrees for a good consideration not to enforce his decree, the Court may legitimately, on the suit of an opposite party, issue an injunction against the former, not to do what he has agreed not to do, Sec. 206, Act VIII of 1859 notwithstanding.—*Nobo Kissen Mookerjee vs. Deb Nath Roy Chowdhury and others*, 22, W. R., 194.

The purchaser of a share of a decree failing to get the Court executing it to put him on the record for the purpose of obtaining the benefit of the decree, has no right to an injunction to prevent the decree-holder from executing the whole decree without regard to the sale, even if the purchase is made on behalf of the judgment-debtor.—*Mussamat Rohimunnissa, Appellant, vs. Nowab Leakat Ali, Respondent*, 22, W. R., 506. Where the owner of an estate built several houses upon it and sold some of them, subject to a covenant on the part of the purchaser, that

he would keep the area in front of the houses, inclosed with open iron palisadoes, and would not suffer a single shop-window to be put up in them, or carry on any trade, business, or calling whatever in them, or upon the adjoining premises, or suffer the same to be used to the annoyance, nuisance, or injury of any of the houses on the estate, it was held that all subsequent assignees and purchasers of the houses who took them with notice of the covenants were bound by them: and an injunction was granted to prevent one of the houses being used as a girls' school, &c.—*Kemp vs. Sober*, 1, Sim., N. S., 520. The Court, in granting an *ad interim* injunction will first see that there is a *bonâ fide* contention between the parties, and then on which side, in the event of obtaining a successful result to the suit, will be the balance of inconvenience, if the injunction do not issue, bearing in mind the principle of retaining immoveable property in *statu quo*. On those principles, an injunction was granted to restrain the defendants from "selling, alienating, or otherwise disposing of" certain houses, the subject of a suit, in which the plaintiff claiming under the will of his father, sought to set aside proceedings in execution taken by an executor &c.—*Gomes vs. Carter and others*, 1, Ind. Jur., N. S., 411. Injunction granted to restrain a partner from excluding his co-partner from the partnership business and from doing any act to prevent its being carried on according to the articles.—*Vardachalla Nattan vs. Ramaswami Nayakaer and others*, 1, Mad. H. C. Rep., A. C., 341. In an application for an injunction to restrain the use of a trade-mark, it is not a sufficient defence to say there was no fraudulent intention, and that is no reason for not granting the application — *Graham and others vs. Kerr, Dods and others*, 3, B. L. R., App., 4. Proof of actual damage is not necessary in order to sustain an action for injunction to restrain the defendant from collecting, without any title, from the ryots of the plaintiff's estate two annas rent over and above the full sixteen annas in the rupee.—*Nadir Jumma Chowdhury vs. Ram Chunder Surma*, W. R., 1864, 362. In a suit to have the portion of a *bund* cut by the plaintiff closed up, and for an injunction restraining the defendant from so cutting the *bund* in future as to injure the plaintiff, held, that it was material to try the question whether the plaintiff had a cause of action, and also the question as to the property in the *bund*, because if the *bund* belonged exclusively to the plaintiff, the defendant, unless he could prove a right of user, was a trespasser, and on the other hand, if it belonged exclusively to the defendant, the defendant had so used his own property as to injure the property of his neighbour.—*Nundo Kissore Singh and others, Defendants, Appellants vs. Hakeem Ramkissore Singh Deb, Plaintiff, Respondent*, 17, W. R., p. 359.

In a suit for a perpetual injunction against the principal defendants to stop the business of brick-making carried on by them on lands which they had taken under temporary leases from the co-defendants, who were holders of small *jotes* within the plaintiff's zemindary, and to recover damages for alleged injury done to the lands, where the evidence showed such a continued use of the land for twenty-five years for the purpose of brick-making, as raised a strong presumption of acquiescence on the part of the land-lord, and that, so far from injuring the land, the defendants had placed it in a better condition than it had been in previously, held, that no case had been made out for the issue of an injunction.—*Tarinee*

*Churn Bose, Appellant vs. Ramjee Pal and others, Respondents*, 23, W. R., p. 298. *Ad interim* injunction is allowed after filing of the plaint.—*Sreenarain Chuckerbutty*, 5, B. L. R., 254; *Roop Lall* (9th June 1870) 5, B. L. R., 254.

Read the following Sections of the Civil Procedure Code (Act X. of 1877) :—

492. "If in any suit it be proved by affidavit or otherwise

"(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

"(b) that the defendant threatens, or is about to remove or dispose of his property with intent to defraud his creditors,

"the Court may by order grant a temporary injunction to restrain such act, or give such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, or refuse such injunction or other order."

493. "In any suit for restraining the defendant from committing a breach of contract or other injury, whether compensation be claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

"The Court may by order grant such injunction on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise as the Court thinks fit, or refuse the same.

"In case of disobedience, an injunction granted under this Section or Section 492 may be enforced by the imprisonment of the defendant for a term not exceeding six months, or the attachment of his property, or both.

"No attachment under this Section shall remain in force for more than one year, at the end of which time if the defendant has not obeyed the injunction, the property attached may be sold, and out of the proceeds the Court may award to the plaintiff such compensation as it thinks fit, and may pay the balance if any, to the defendant."

494. "The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party."

495. "An injunction directed to a corporation or public company is binding not only on the corporation or company itself, but also on all members and officers of the corporation or company whose personal action it seeks to restrain."

496. "Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order."

497. "If it appears to the Court that the injunction was applied for on insufficient grounds, or if, after the issue of the injunction, the suit is dismissed or



judgment is given against the plaintiff by default or otherwise, and it appears to the Court that there was no probable ground for instituting the suit,

"the Court may, on the application of the defendant, award against the plaintiff in its decree such sum, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him by the issue of the injunction :

"Provided that the Court shall not award under this Section a larger amount than it might decree in a suit for compensation.

"An award under this Section shall bar any suit for compensation in respect of the issue of the injunction."

55. When to prevent the breach of an obligation it is necessary to compel the performance of certain acts which  
**Mandatory injunctions.** the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite act.

#### *Illustrations.*

(a.) A, by new buildings, obstructs lights to the access and use of which B has acquired a right under the Indian Limitation Act, Part IV. B may obtain an injunction, not only to restrain A from going on with the buildings, but also to pull down so much of them as obstructs B's lights.

(b.) A builds a house which eaves projecting over B's land. B may sue for an injunction to pull down so much of the eaves as so project.

(c.) In the case put as illustration (i) to Section 54, the Court may also order all written communications made by B, as patient, to A, as medical adviser, to be destroyed.

(d.) In the case put as illustration (j) to Section 54, the Court may also order A's letters to be destroyed.

(e.) A threatens to publish statements concerning B which would be punishable under Chapter XXI of the Indian Penal Code. The Court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to B's property.

(f.) A, being B's medical adviser, threatens to publish B's written communications with him, showing that B has led an immoral life. B may obtain an injunction to restrain the publication.

(g.) In the cases put as illustrations (v) and (w) to Section 54, and as illustrations (e) and (f) to this Section, the Court may also order the copies produced by piracy, and the trademarks, statements, and communications therein respectively mentioned, to be given up or destroyed.

*Illustration (a)* is the case of *Smith vs. Smith*, 23, W. R., 771; *Jessel vs. Chapman*, 2, Jur., N. S., 931. Where it was covenanted by the lessee of an inn that he will keep it open and not discontinue it, the Court refused to grant an injunction to enforce the specific performance of the contract.—*Hooper vs. Brodick*, 11, Simmons, 47. The sale of a good will of a partnership.—*Story*, Eq. Juris., Sec. 951 d

No remedy against illegal taxation.—*Wilson vs. The Mayor of New York*.—Story, Eq. Juris., Sec. 951 a. The mere fact that the defendant when re-building the house built its new front wall in advance of the plaintiff's, thus encroaching on the defendant's own verandah in breach of the agreement, is not sufficient in itself to justify the Court in granting a mandatory injunction ordering its removal.—*Ranchod Jamnadas*, 10, B. H. C. R., 95.

Injunction when refused. 56. An injunction cannot be granted—

(a) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings ;

(b) to stay proceedings in a Court not subordinate to that from which the injunction is sought ;

(c) to restrain persons from applying to any legislative body ;

(d) to interfere with the public duties of any department of the Government of India or the Local Government, or with the sovereign acts of a foreign Government ;

(e) to stay proceedings in any criminal matter ;

(f) to prevent the breach of a contract the performance of which would not be specifically enforced ;

(g) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance ;

(h) to prevent a continuing breach in which the applicant has acquiesced ;

(i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust ;

(j) When the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court ;

(k) where the applicant has no personal interest in the matter.

### *Illustrations.*

(a) A seeks an injunction to restrain his partner, B, from receiving the partnership-debts and effects. It appears that A had improperly possessed himself of the books of the firm and refused B access to them. The Court will refuse the injunction.

(b) A manufactures and sells crucibles, designating them as "patent plumbago crucibles," though, in fact, they have never been patented. B pirates the designation. A cannot obtain an injunction to restrain the piracy.

(c) A sells an article called "Mexican Balm," stating that it is compounded of divers rare essences, and has sovereign medical qualities. B commences to sell a similar article to which he gives a name and description such as to lead people into the belief that they are buying A's Mexican Balm. A sues B for an injunction

to restrain the sale. B shows that A's Mexican Balin consists of nothing but scented hog's lard. A's use of his description is not an honest one, and he cannot obtain an injunction.

*Clause (a).—Vide, Roy Luchmeeput Singh Bahadoor, Appellant, 20, W. R., 11; Mussamut Roheenunnessa, Appellant, 22, W. R. 506; Nobokissen Mookerjee, Appellant, 22, W. R., 194; Story, Eq. Juris., Section 885.* "Indeed, the occasions on which an injunction may be used to stay proceedings at law are almost infinite in their nature and circumstances. In general it may be stated, that in all cases where by accident, or mistake, or fraud, or otherwise, a party has an unfair advantage in proceedings in a Court of law, which must necessarily make that Court an instrument of injustice, and it is, therefore, against conscience that he should use that advantage, a court of equity will interfere, and restrain him from using the advantage which he has thus improperly gained; and it will also generally proceed to administer all the relief which the particular case requires, whether it be by a partial or by a total restraint of such proceedings. If any such unfair advantage has been already obtained by proceedings at law to a judgment, it will, in like manner, control the judgment and restore the injured party to his original rights."

"The injunction is not confined to any one point of the proceedings at law; but it may be granted at any stage of the suit."—Story, Eq. Juris., Sec. 886. "The general reasoning upon which this doctrine is maintained, is the common maxim that courts of equity, like courts of law, require due and reasonable diligence from all parties in suits, and that it is sound policy to suppress multiplicity of suits."—Story, Eq. Juris., Sec. 896. "No injunction to a judgment or other proceedings at law can be granted against a mistake in pleading."—Story, Eq. Juris., Sec. 897. "Courts of equity will not grant an injunction to stay proceedings at law, merely on account of any defect of jurisdiction of the Court where such proceedings are pending."—Story, Eq. Juris., Sec. 898.

*Illustration (d).—To the question whether courts of equity have authority to stay proceedings in the Courts of foreign countries, the answer is in the negative, but they have an undoubted right to control all persons and things within their own territorial limits.*—Eden on "Injunctions," Ch. VII. pp. 141, 142.

*Clause (d).—See, Emperor of Austria vs. Day and Kossuth, 7, Juris, N. S., 483. Vide, Story, Eq. Juris., Sec. 951 e.*

*Clause (d).—*"The question has been made, how far a court of equity has jurisdiction to interfere in cases of public functionaries who are exercising special public trusts or functions. As to this, the established doctrine now is, that so long as those public functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, this court will not interfere. The court will not interfere to see whether any alteration or regulation which they may direct is good or bad; but if they are departing from that power which the law has vested in them, if they are assuming to themselves a power which the law does not give them, this court no longer considers them as acting under authority of their commission, but treats them, whether they be a corporation or individuals merely as persons dealing with property without legal authority."

"Courts of equity often interpose to prevent their own officers, or persons employed under the authority of the court, from proceedings at law. Thus commissioners for the examination of witnesses have been restrained from proceeding at law to recover their fees; and the same principle has been applied to an auctioneer who has sold property under an order of court."—Story, Eq. Juris., Sec. 891. Consult *Ellis vs. Grey*, 6, Sim., 214; *Gladstone vs. Ottoman Bank*, 9, Jur., N S., 246.

*Clause (e).*—"As, for instance, they will not grant an injunction to stay proceedings on a *mandamus* or an indictment, or an information, or a writ of prohibition".—Eden on "Injunction," Ch. II, pp. 41, 42; Story, Eq. Juris., Sec. 891; Jeremy on "Eq. Jurisd.," B. 3, Ch. II, Sec. 1, p. 309.

*Clause (f)*—*Vide, Reynolds vs. Nilson*, 6, Mad. B., 290 "If a decree has been made against a vendor for the specific performance of a contract for the sale of land, notwithstanding the vendor has not strictly complied with the terms of the contract, and subsequently a suit is brought by the vendor against the vendee for the breach of the contract, an injunction will be granted".—Story, Eq. Juris., Sec. 904.

*Clause (i).*—"Where a party is guilty of continual and repeated breaches of his covenants, although it may be said that such breaches may be recompensed by repeated actions of covenant, yet a court of equity will interpose and enjoin the party from further violations of such contract, for without such interposition the party can do nothing but repeatedly resort to law".—Story, Eq. Juris., Sec. 901.

*Clause (j).*—"Relief will not be granted by staying proceedings at law, after a verdict, if the party applying has been guilty of laches as to the matter of defence, or might, by reasonable diligence, have procured the requisite proofs before the trial".—Story, Eq. Juris., Secs. 895, 895 a

*Clause (k)*—The doctrine of laches applies as no time is fixed by the Limitation Act

*Illustration (a)*—*Littlewood vs. Caldwell*, 11, Price, 97.

*Illustration (b)*—*Morgan vs. McAdam*, 36, L. J., ch. 228

57. Notwithstanding Section 56, clause (f), where a contract

Injunctions to perform comprises an affirmative agreement to do a certain negative agreement. act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement, shall not preclude it from granting an injunction to perform the negative agreement, provided that the applicant has not failed to perform the contract so far as it is binding on him.

#### *Illustrations.*

(a.) A contracts to sell to B for Rs. 1,000 the good-will of a certain business unconnected with business premises, and further agrees not to carry on that business in Calcutta. B pays A the Rs. 1,000, but A carries on the business in Calcutta.

The Court cannot compel A to send his customers to B, but B may obtain an injunction restraining A from carrying on the business in Calcutta.

(b.) A contracts to sell to B the good-will of a business. A then sets up a similar business close by B's shop, and solicits his old customers to deal with him. This is contrary to his implied contract, and B may obtain an injunction to restrain A from soliciting the customers, and from doing any act whereby their good-will may be withdrawn from B.

(c.) A contracts with B to sing for twelve months at B's theatre and not to sing in public elsewhere. B cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining A from singing at any other place of public entertainment.

(d.) B contracts with A that he will serve him faithfully for twelve months as a clerk. A is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining B from serving a rival house as clerk.

(e.) A contracts with B that in consideration of Rs. 1,000 to be paid to him by B on a day fixed, he will not set up a certain business within a specified distance. B fails to pay the money. A cannot be restrained from carrying on the business within the specified distance.

*Vide, Lumley vs. Wagner*, 1, De G., M. & G., 618; *Kemble vs. Kean*, 6, Simons R., 333; *Kimberley vs. Jennings*, 6, Simons R., 340; *Webster vs. Dillon*, 3 Jur., N. S., 432.

The principle of the jurisdiction is to bind men's consciences to a fair and strict performance of their agreements, not leaving the party with whom the contract has been broken to the chance of what a jury may give in the shape of damages, but enforcing, where it can, the literal performance of the contract. Where there is a contract containing a positive agreement to do something accompanied by a negative agreement not to do another thing, and complete justice can be done between the parties, the Court will restrain the breach of the negative agreement, although it may be unable to enforce performance of the positive agreement. But the Court rarely interferes where there is no distinct negative stipulation; but the negative obligation is inferred only from the positive contract.—*Peto vs. Brighton, Uckfield and Tunbridge Wells Ry. Co.*, 32, L. J., ch. 677; 1, H. and M., 168. Where a negative clause is merely incidental to the general relief and the entire agreement is broken, no relief will be granted in respect of the negative clause.—*Brett vs. East Indian & London Shipping Co.*, 2, H. & M., 404. Where a vessel has been engaged under charter-party for the performance of a particular voyage, the Court will, in certain cases, indirectly enforce performance of the contract by restraining the ship-owner from employing his vessel in a manner different from that agreed upon.—*De Mattos vs. Gibson*, 28, L. J., ch. 502.

## PROCESS FEES.\*

THE FOLLOWING RULES HAVING BEEN CONFIRMED BY THE LOCAL GOVERNMENT AND SANCTIONED BY THE GOVERNOR GENERAL IN COUNCIL, WERE PUBLISHED IN THE "CALCUTTA GAZETTE" ON THE 6TH FEBRUARY 1878.

*Revised Rules framed by the High Court of Judicature at Fort William in Bengal, in accordance with Clause I, Section 20 of the Court Fees' Act of 1870, declaring the Fees chargeable for Serving and Executing Processes issued by the High Court in its Appellate Jurisdiction, and by the other Civil and Revenue Courts established within the limits of such Jurisdiction.*

**RULE I.**—The fees exhibited in the following table shall be charged for serving and executing the several processes against which they are respectively ranged :—

### TABLE OF FEES.

**PART I.**—In the High Court, Appellate Jurisdiction—

Proper Fees.  
Rs. A. P.

*Article 1.*—Summons to defendants, notice of appeal, or other notice to respondents, when the defendants or respondents are not more than four in number, *one fee* ... 3 0 0

When such defendants or respondents are more than four in number, then the fee above mentioned for the first four, and an additional fee of 8 annas for every such person in excess of four.

*Article 2.*—Summons to witnesses when the witnesses named therein are not more than four in number, *one fee* 3 0 0  
When such witnesses are more than four in number, then the fee above-mentioned for the first four, and an additional fee of 8 annas for every such witness in excess of four.

*Article 3.*—Every commission to make a local investigation or to take evidence, or for any other purpose—

(a) in respect of the commission .. 3 0 0

(b) in respect of the remuneration of the Commissioner, *Such sum as the Court*  
*i. e., person who is to execute the commission, per diem* ... direct.

\* *Ide* Calcutta Gazette, dated 6th February, 1878.

*Note.*—A sum sufficient to cover the daily fee (*b*) for such period as may be fixed by the Court for the purpose of executing the commission must be paid in addition to the fee (*a*) at the time when the commission is issued; and, if the commission is not completely executed within the period so fixed, a further sum, sufficient to cover the daily fee (*b*) for the excess period extending from the end of that fixed period up to, and inclusive of, the date of the complete execution of the commission, must be paid before the Commissioner's report or other return to the commission is used.

	Rs. A. P.
<i>Article 4.</i> —Every warrant of the person	3 0 0

<i>Article 5.</i> —Every rule, notice, proclamation, injunction, or other order not specified in any preceding Article of this part	3 0 0
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PART II.—In the Courts of Judges, and in the Revenue Courts when the suit in the Revenue Courts in which the process is issued is valued at a sum exceeding Rs. 1,000—

	Rs. A. P.
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<i>Article 1.</i> —Summons to defendants, notice of appeal, or other notice to respondents when the defendants or respondents are not more than four in number, <i>one fee</i>	2 0 0
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When such defendants or respondents are more than four in number, then the fee above-mentioned for the first four, and an additional fee of 8 annas for every such person in excess of four.

<i>Article 2.</i> —Summons to witnesses, when the witnesses are not more than four in number, <i>one fee</i>	2 0 0
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When such witnesses are more than four in number, then the fee above-mentioned for the first four, and an additional fee of 8 annas for every such witness in excess of four.

*Article 3.*—Every commission to make a local investigation or for any other purpose—

(a) in respect of the commission	2 0 0
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(b) in respect of the remuneration of the Commissioner, i. e., person who is to execute the commission, if such person be an officer of Government specially appointed for the purpose, <i>per diem</i>	3 0 0
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*Note.*—A sum sufficient to cover the daily fee (*b*) for such period as may be fixed by the Court for the purpose of executing the commis-

sion must be paid in addition to the fee (a) at the time when the commission is not completely executed within the period so fixed, a further sum, sufficient to cover the daily fee (d) for the excess period extending from the end of that fixed period up to, and inclusive of, the date of the complete execution of the commission, must be paid before the Commissioner's report or other return to the commission is used.

Rs. A. P.

*Article 4.*—Every process of attachment of property by actual seizure—

(c) in respect of the warrant of attachment	2	0	0
(d) in respect of each man, necessary to effect the attachment and also to ensure safe custody, when such man is to be left actually in possession, <i>per diem</i> ...	0	6	0

*Note.*—The daily fee (d) is to be paid at the time of obtaining the process for so many days as the Court shall order, not being ordinarily less than 15 days, and the number of days required for the coming and going of the officer; but where the officer is not to be left in possession, then the daily fee (d) is to be paid only for the time to be occupied by the officer going, effecting the attachment, and returning. When the inventory filed by the judgment creditor shows the property to be of such small value, that the expense of keeping it in custody may probably exceed the value, the Court shall fix the fee with reference to the provisions of section 269 of the Code of Civil Procedure of 1877.

Rs. A. P.

*Article 5.*—Every process in execution of a decree by the arrest of the person ...

10 0 0

*Article 6.*—Every order for the sale of property, other than an order for the sale of distrained property under Act VIII. of 1869, Bengal Council—

(e) in respect of the order of sale	2	0	0
(f) by way of poundage on the gross amount realized by the sale up to Rs. 1,000	2	per cent.	
together with further fee on all excess of gross proceeds beyond Rs. 1,000 of	1	per cent.	

*Note.*—The portion (e) of this fee must be paid when the process is obtained, and the poundage (f) must be paid at the time of making the application for payment of the proceeds of sale out of Court, as herein after provided.



Rs. A. P.

*Article 7.*—Every rule, notice, proclamation, injunction, or other order not specified in any preceding Article of this part ... .. 2 0 0

PART III.—[Except in the suits specified in Part IV.] In the Courts of Moonsiffs and of Small Causes, and in the Revenue Courts when Part II. does not apply.

Rs. A. P.

*Article 1.*—Summons to defendants, notice of appeal, or other notice to respondents, when the defendants or respondents are not more than four in number, *one fee* ... 1 0 0  
When such defendants or respondents are more than four in number, then the fee above-mentioned for the first four, and an additional fee of 4 annas for every such person in excess of four.

*Article 2.*—Summons to witnesses, when the witnesses are not more than four in number, *one fee* ... 1 0 0  
When the witnesses are more than four in number, then the fee above-mentioned for the first four, and an additional fee of 4 annas for every such witness in excess of four.

*Article 3.*—Every commission to make a local investigation or to take evidence, or for any other purpose—

(a) in respect of the commission ... 1 0 0  
(b) in respect of the remuneration of the Commissioner, *i. e.*, person who is to execute the commission, if such person be an officer of Government specially appointed for the purpose, *per diem* ... 3 0 0

*Note.*—A sum sufficient to cover the daily fee (b) for such period as may be fixed by the Court for the purpose of executing the commission must be paid in addition to the fee (a) at the time when the commission is issued; and if the commission is not completely executed within the period so fixed, a further sum, sufficient to cover the daily fee (b) for the excess period extending from the end of that fixed period up to, and inclusive of, the date of the complete execution of the Commissioner's report or other return to the commission is used.

Rs. A. P.

*Article 4.*—Every process of attachment of property by actual seizure—

(c) in respect of the warrant of attachment ... 1 0 0

Rs. A. P.

(d) in respect of each man necessary to effect the attachment and also to ensure safe custody, when such man is to be left actually in possession, *per diem* ... 0 4 0

*Note.*—The daily fee (d) is to be paid at the time of obtaining the process, for so many days as the Court shall order not being ordinarily less than 15 days, and the number of days required for the coming and going of the officer; but where the officer is not to be left in possession, then the daily fee is to be paid only for the time to be occupied by the officer going, effecting the attachment, and returning. When the inventory filed by the judgment creditor shows the property to be of such small value, that the expense of keeping it in custody may probably exceed the value, the Court shall fix the daily fee with reference to the provisions of section 269 of the Code of Civil Procedure of 1877.

Rs. A. P.

*Article 5.*—Every process in execution of a decree by the arrest of the person ... 4 0 0

*Article 6.*—Every order for the sale of property other than an order for the sale of distrained property under Act VIII. (B. C.) of 1869—

(e) in respect of the order of sale ... 1 0 0

(f) by way of poundage on the gross amount realized by the sale up to Rs. 1,000 ... 2 per cent.  
together with a further fee on all excess of gross proceeds beyond Rs. 1,000 of ... 1 per cent.

*Note.*—The portion (e) of this fee must be paid when the process is obtained; and the poundage (f) at the time of making the application for payment of the proceeds of sale out of Court, as hereinafter provided.

Rs. As. P.

*Article 7.*—Every rule, notice, proclamation, injunction, or other order, not specified in any preceding Article of this part ... 1 0 0

**PART IV.**—In the Courts of Munsiffs, in Small Cause Courts, and in the Revenue Courts where the suit is for debt or damage, to personal property, or for rent, and where the claim does not exceed Rs. 50.

Rs. As. P.

*Article 1.*—Summons to defendants, when the defendants are not more than two in number, *one fee* ... 0 8 0

Rs. A. P.

When the defendants are more than two in number, the fee above-mentioned for the first two, and an additional fee of 4 annas for every such defendant in excess of two.

*Article 2.* Summons to witnesses in respect of each witness .. .. . 0 4 0

*Article 3.*—Every commission to make a local investigation or to take evidence, or for any other purpose—

(a) in respect of the commission ... .. 1 0 0

(b) in respect of the remuneration of the Commissioner, i. e., person who is to execute the commission, if such person be an officer of Government especially appointed for the purpose, *per diem* ... .. 3 0 0

*Note.*—A sum sufficient to cover the daily fee (b) for such period as may be fixed by the Court for the purpose of executing the commission must be paid in addition to the fee (a) at the time when the commission is issued, and if the commission is not completely executed within the period so fixed, a further sum, sufficient to cover the daily fee (b) for the excess period extending from the end of that fixed period up to and, inclusive of, the date of the complete execution of the commission, must be paid before the Commissioner's report or other return to the commission is used.

Rs. A. P.

*Article 4.*—Every process of attachment of property by actual seizure—

(c) in respect of the warrant of attachment .. 0 8 0

(d) in respect of each man necessary to effect the attachment and also to ensure safe custody, when such man is to be left actually in possession, *per diem* ... .. 0 4 0

*Note.*—The daily fee (d) is to be paid at the time of obtaining the process for so many days as the Court shall order, not being ordinarily less than 15 days, and the number of days required for the coming and going of the officer; but where the officer is not to be left in possession, then the daily fee is to be paid only for the time to be occupied by the officer going, effecting the attachment, and returning. When the inventory filed by the judgment-creditor shows the property to be of such small value that the expense of keeping it in custody may probably exceed the value, the Court shall fix the daily fee with reference to the provisions of section 260 of the Code of Civil Procedure of 1877.

Rs. A. P.

*Article 5.*—Every process in execution of a decree by arrest of the person . . . .. 1 0 0

*Article 6.*—Every order for the sale of property other than an order for the sale of distrained property under Act VIII. (B. C.) of 1869—

(e) in respect of the order of sale . . . . . 1 0 0

(f) by way of poundage on the gross amount realized by the sale up to Rs. 1,000 of . . . . . 2 per cent.  
together with a further fee on all excess of gross proceeds beyond Rs. 1,000 of . . . . . 1 per cent.

*Note.*—The portion (e) of this fee must be paid when the process is obtained; and the poundage (f) at the time of making the application for payment of the proceeds of sale out of Court as hereinafter provided.

Rs. A. P.

*Article 7.*—Every rule, notice, proclamation, injunction, or other order not specified in any preceding Article of this part . . . . . 1 0 0

**RULE II.**—Notwithstanding Rule I, no fee shall be chargeable for serving and executing any process, such as a notice, rule, summons or warrant of arrest which may be issued by any Court of its own motion, solely for the purpose of taking cognizance of, and punishing any act done, or words spoken, in contempt of its authority.

**RULE III.**—No process which comes within the operation of Rule I shall be drawn up for service or execution, except upon an application made to the Court for that purpose in writing, on a document bearing upon its face stamps not less in amount than the fee which by Rule I is directed to be charged for serving and executing the process so sought to be drawn up. This application may, however, at the option of the party making it, be included in the petition by which he moves the Court to order the process to issue, but in that case the petition must bear the requisite stamps for the process fee, in addition to such stamps, if any, as are needed for its own validity; and, in either case, the filing of the application, thus duly stamped, shall constitute payment of the fee chargeable for the process.

**RULE IV.**—In cases which are covered by the note to Article 3 of Part I, and the note to Articles (3) and (4) of Parts II, III and IV of the Table of Fees in Rule I, the additional fee which may become

payable after the process has been actually issued shall be paid by filing a written requisition to the Court to receive the fee, which document shall bear on the face of it stamps not less in amount than the additional fee, together with a memorandum of the purpose for which it is paid.

**RULE V.**—The proceeds of a sale effected in execution of any decree will only be paid out of Court on an application made for that purpose in writing, and the additional fee (₹), Article (6), Parts II, III and IV must be paid by stamps affixed to, or impressed upon, the first of such applications: whether it be or be not made by the person who obtained the order for sale, or whether it does or does not extend to the whole of the proceeds. No fee will be chargeable upon any such application subsequent to the first.

**N. B.**—The fees paid in pursuance of these Rules must in all proceedings be deemed and treated as part of the necessary and proper costs of the party who pays them.

RICHARD GANTH.

F. B. KEMP.

LOUIS S. JACKSON.

W. MARKBY.

W. AINSLIE.

CHARLES PONTIFEX.

G. G. MORRIS. \*

J. SEWELL WHITE.

R. C. MITTER.

H. S. CUNNINGHAM.

W. F. McDONELL.

H. T. PRINSEP.

## CALCUTTA HIGH COURT.

*The 21st January and 26th February, 1878.*

FULL BENCH.

PRESENT :

The Hon'ble Sir B. Garth, Kt., Chief Justice, and the Hon'ble F. B. Kemp, L. S. Jackson, C. I. E., W. Markby, W. Ainslie, E. G. Birch, and R. C. Mitter, Justices.

In the Matter of RUP NATH BANERJI,\* a Vakeel of the High Court.

*Pleader—Professional Misconduct.*

Where a case was struck off the file for the negligence of the pleader to appear, and the pleader instead of applying at once to the Court, at his own expense, to have the case restored to the file, wrote to the client to come down a long distance, at great expense and inconvenience, in order to oblige her, if he could, to pay him an additional fee for taking the necessary proceedings to remedy the consequences of his own neglect, the Full Bench considered him not to be a fit person to be entrusted with the conduct of business, or the interests of clients, and his name was ordered to be struck off the rolls of Vakils.

The facts of this case are very fully set out in the judgment of the Court, which was delivered by the learned Chief Justice.

GARTH, C. J.—This was a rule calling upon Babu Rup Nath Banerji, a pleader of this Court, to shew cause why he should not be struck off the roll of vakils.

The particular grounds of misconduct upon which the rule issued were as follows :—

The pleader was retained by Aola Bibi, a widow woman residing at Rungpore, to conduct for her a special appeal in a suit for dower. The case being entered in the list of appeals before a division bench of this Court, was called on for argument in the usual course about 4 o'clock on the 9th day of May last; and as no one appeared for the appellant, the appeal was dismissed with costs.

No application was made to have the case restored to the file, and nothing more was heard of it until the 8th day of August following, when, upon a petition of the appellant, accompanied by an affidavit, an application was made by the pleader on behalf of his client to restore the appeal to the file.

This was refused; but upon another application being made on the 10th by the appellant herself upon another petition, which set forth her pleader's misconduct, and the hardship of her own case, the appeal was restored to the file.

\* *Vide Englishman*, 2nd March, 1878.

It appeared from these petitions, and the affidavit of Aola Bibi, which accompanied the first, and which was witnessed by the pleader himself, that the case had been dismissed on the 9th of May entirely through the default of the pleader, who had no excuse for not being present when the case was called on, except that he did not expect it would be reached; that the first time the appellant herself learnt that the appeal had been dismissed was *not from her pleader*, but from the respondent; that she was then driven to the expense and inconvenience of a journey to Calcutta to endeavour to get her case restored, that the pleader expected her to pay the expense herself of taking the necessary proceedings for that purpose; and that he kept her waiting in Calcutta from about the middle of July to the 10th of August, making evasive excuses to her for not applying earlier, and detaining her here in Calcutta, until the application was made on the 8th of August.

Upon these facts being brought to the notice of the Division Bench, they considered it right to call upon the pleader for an explanation of his conduct; and on the 20th of August the following attempt at explanation was handed in by Babu Rup Nath Banerji to the Court:

To—The Hon'ble Sir Richard Garth, Kt., Chief Justice, and his companion Judges of the said Court.

In the matter of Special Appeal No. 192 of 1876.

"In obedience to the order of this Hon'ble Court, I respectfully beg to submit the following explanation:—

"First, on the 9th of May last I went at about 3 p. m. to the Division Court consisting of the Justices Birch and Mitter, and found that the Special Appeal, No. 192 of 1877, was below 5 or 6 cases in the Board of Special Appeal of that day.

"Second, considering that there was no likelihood of the said Special Appeal being taken up on that day, I left the Court at about 4 p. m.

"Third, on the following day, I learned that the above Special Appeal was called on and taken up last on the previous day and dismissed for default of prosecution, no one appearing for the appellant.

"Fourth, I immediately gave my mohurrir, or clerk, who was acquainted with my client's address, orders to write to her of the appeal having been struck off as above, and asking her to come down herself and make arrangements for its restoration.

"Fifth, awaiting for answer and being obliged to stop at Bowranipore for some time, I took no further steps at the time in the matter, which afterwards passed from my remembrance.

"Sixth, my client then came to me about a fortnight ago, *i. e.*, about the 22nd or 23rd of July last, when I drew up an affidavit and a petition, and moved the Court to restore the appeal, which affidavit was rejected on the 8th of August last.

"Seventh, I extremely regret of what has occurred; any fault was quite unintentional, and I humbly pray that I may be pardoned, and the appeal restored to its former number as it was not struck off through any fault of the appellant.—I remain, Sir, your most obedient servant, Roop Nath Banerji, Pleader."

This account appeared to the Division Bench so extremely unsatisfactory, that they thought fit to submit the whole matter to the consideration of the Court; and they did so by an order of reference in the following terms:

"Order of reference dated 28th August 1877.

"We think that the written statement of Babu Roop Nath Banerji should, together with the second petition of Aola Bibi, so far as it relates to the conduct of her vakil, be submitted to the Chief Justice and Judges of the High Court for their consideration and orders: and we direct the Registrar to take the necessary steps for the purpose.

"Aola Bibi's Special Appeal was dismissed on the 9th of May last, in consequence of the vakil's default in appearing when the appeal was called on. On the 22nd or 23rd of July, the special appellant herself came down to Calcutta owing to information which she had received from her opponents, the respondents, that her appeal had been dismissed. It was only then that Babu Roop Nath Banerji commenced to take measures to get the appeal reinstated, which ended in his application of the 8th of August.

"He offers no explanation why he did not endeavour to remedy his own neglect, by applying for the restoration of the appeal within a day or two after its dismissal.—Sewell White, Romesh Chunder Mitter: August 28, 1877."

Upon this, the following rule was issued by the 1st Bench in the following terms:—

"In the matter of Roop Nath Banerji a vakil.

"Upon reading the order made by the Hon'ble Sewell White and R. G. Mitter, two of the Judges of the Court, on the 28th of August 1877, and the two petitions of Aola Bibi, dated the 31st July and the 28th August 1877, respectively, and the explanation of Babu Roop Nath Banerji received on the 20th August 1877—It is ordered that the said



Babu Roop Nath Banerji do, within 10 days from the date of service upon him of this rule, shew cause why he should not be dismissed, and his name struck off the list of pleaders of the High Court.

Dated this 6th day of December 1877.

Signed and Sealed by order of the High Court — J. Crawford, Offg. Registrar."

Upon the hearing of this rule on the 21st of January last before a Court constituted of seven Judges, (the majority of whom were the most experienced members of the Court, and before whom Babu Rup Nath has been in the habit of conducting business for several years past) he argued his case himself, and brought forward an affidavit of his own, (the only one which he used,) in which he addresses himself principally to the last paragraph in the order of reference by the Division Bench. The explanation he gives in this affidavit, of his own delay in applying to the Court to restore the appeal is, that, in the first instance, he thought it safe and desirable to wait till his client arrived in Calcutta, before making the application to restore the appeal; and that afterwards, owing to the press of other business, the matter escaped his recollection.

In the course of the hearing, Bubu Rup Nath Banerji's attention was directed to the fifth and eleventh paragraphs of Aola Bibi's affidavit filed on the 31st of July, for which, as far so it related to matters within his own knowledge, he was clearly responsible, and it was pointed out to him that the explanation there given clearly referred to the non-payment by his client of a further fee as the cause of his delay, and that no other excuse for it is mentioned in the affidavit.

To this observation on the part of the Court, the Babu made two answers; first, that he did not delay making the application because he had not received a further fee, and secondly, that it was the universal practice of the profession to require a further fee for making such an application.

These answers somewhat inconsistent with each other; and we regret to say that one of these, at least, is, in our opinion, untrue.

The statement contained in the second answer is in itself so monstrous and would, if true, be so discreditable to the profession, that it was upon the spot, and in open Court, repudiated by several *rakils* who were present listening to the argument, and who heard the statement made. We are also informed by Mr. Justice Mitter that this statement is untrue.

With regard to the first statement, if the real cause of the Babu's delay was not the fact that the further fee had not been paid, but his own forgetfulness owing to press of business, it is difficult to understand why it was that the false excuse, and not the real one, should have been put forward in Aola Bibi's affidavit. There is, indeed, but one possible explanation of this omission; but this we are compelled to say is equally fatal to the Babu's character for veracity. Babu Roop Nath Bauerji has been frequently censured by different Judges of this Court for the careless and unsatisfactory manner in which he conducts his business; and only so recently as the 11th of last July he was ordered by Mr. Justice Birch and Mr. Justice Mitter to pay out of his own pocket the expense connected with the restoration of an appeal which has been struck off under circumstances similar to those which led to the striking off of the appeal of Aola Bibi. The Babu was therefore naturally anxious, when coming again so soon before the same Judges, that it should appear that the blame rested not with himself, but with his client. It is to be observed that, even in the explanation which he gave to the Division Bench, when called upon to answer Aola Bibi's complaint against him, though he makes no direct allusion to the non-payment of the fee, he is very careful to avoid taking upon himself any responsibility for the delay in making the application. And it was only when he found that he must take that responsibility, that he, for the first time, put forward, as an excuse for the delay, his own forgetfulness owing to press of work.

Most probably the first statement made is the true one, that the real cause of his delay was that a further fee was expected, and not paid. But in either case, the result is the same,—either that the Babu allowed his client to make an untrue statement on the 31st of July, or that he has himself made an untrue statement now.

If Babu Roop Nath Bauerji's misconduct in this instance had simply consisted in not attending to his client's case, and then not adopting the ordinary course, which pleaders ought always to take, and almost invariably do take, of applying as early as possible to have the case restored; and if, moreover, this had been the first instance in which he had neglected his client's interests, the Court would probably not have thought it necessary to issue this rule, and might have inflicted no graver punishment upon him than a short suspension, or even a severe rebuke.

But there are circumstances of aggravation about this case which the Court regards as very much more serious than the pleader's original misconduct.

It appears clearly from his own statement, and from the affidavit of his client, to which he was the attesting witness, that, instead of adopting what he knew perfectly well was the usual and proper course after his client's case had been dismissed, that is to say, to apply at once to the Court, at his own expense, (if any) to have the case restored to the file, he instructed his clerk to write to this poor woman and to bring her down a long distance to Calcutta, at great expense and inconvenience, in order to oblige her, if he could, to pay him an additional fee for taking the necessary proceedings to remedy the consequences of his own neglect.

Having given these instructions to his clerk, he took no more trouble about the matter, until after in vain attempting to make her pay the costs of the application, and postponing her case for days to suit his own convenience, he at last applied to the Court to restore the appeal.

But that is not all. Having been first directed by the Division Court to explain his conduct, and having then been called upon by this rule to shew cause why he should not be punished, the very least which the Court had a right to expect from him was that he should give them a candid and truthful explanation.

Instead of this, we regret to say his argument on the hearing of this rule was disingenuous and prevaricating; and if the Court had entertained any doubts as to the propriety of inflicting upon him the extreme punishment of striking his name off the roll, his behaviour and the course he took on that occasion would certainly have removed those doubts.

It is of the utmost consequence in this country, where, from the ignorance and isolated condition of large portions of the population, the poorer classes of litigants are necessarily much at the mercy of their legal advisers, that the Court should, as far as they can, protect the public from the unconscientious avarice of dishonest pleaders, and it is also of the utmost consequence that when professional men are called upon by the Court to give an explanation of their conduct, they should be compelled by the most stringent measures which the Court is empowered to enforce, to give a truthful and honest account of their dealings with their clients.

In this case the pleader has greatly aggravated his first offence by the dishonest manner in which he has dealt with the Court.

We consider, therefore, that Babu Rup Nath Banerji is not a fit person to be entrusted with the conduct of business, or the interests of clients, and that his name should be struck off the roll of vakils of this Court.

### IMPORTANT DIRECTIONS.

*Note* that the case of *Jogesh Chunder Dutt vs. Kalli Charn Dutt* in 5, *Legal Companion*, p. 292 (Copy for November and December 1877) has been reported in the *Indian Law Reports*, 3, *Calcutta Series*, p. 30 (Copy for February 1878), and read in 5, *Legal Companion*, p. 292, line 7, *Respondents* for *Appellants*, and, in line 9, *Appellant* for *Respondent*.

### SHORT NOTES.

#### PRIVY COUNCIL.

*Limitation (Act XIV. of 1859), ss. 20, 21—Execution of Decree—Interpretation of Statutes—Res-judicata—Act VIII. of 1859, s. 2.*

A decree was obtained in the Court of the Deputy Commissioner of Delhi on the 5th October, 1866, prior to the date when Act XIV. of 1859 was extended to the Punjab, *viz.*, the 1st of January, 1867. On the 22nd of October, 1869, an application admittedly *bond fide*, was made for execution, but the application was refused on the ground that it was barred by lapse of time, and no appeal was brought against that order. A subsequent application for execution was made on the 4th of May, 1871, which was also refused on a similar ground. On appeal the Commissioner and Chief Court confirmed this order. *Held*, reversing the decision of the Court below, that execution of the decree was not barred by s. 21, Act XIV. of 1859.

In interpreting statutes, the words 'must' and 'shall' may, in some cases, be substituted for the word 'may,' but only for the purpose of giving effect to the intention of the Legislature. In the absence of proof of such intention, the word 'may' should be taken as used in its natural, *i. e.*, in a permissive, and not in an obligatory, sense.

In construing s. 21, Act XIV. of 1859, the words "nothing in the preceding section shall apply to a judgment in force at the time of the passing of the Act," mean that nothing in the preceding section should prejudicially affect the right of a creditor under a judgment in force at the time of the passing of the Act: and the words "but process of execution may be issued, &c.," mean that notwithstanding anything in the preceding section, execution might issue either within the time limited by the law in force when the Act was passed, or within three years next after the passing of the Act, whichever should first expire.

An order passed by a Court rejecting a *bond fide* application by a

judgment-creditor for the execution of his decree on the ground that the period allowed by law for execution had expired, *held* not to be an adjudication within the rule of *res-judicata*, or within s. 2, Act VIII. of 1859.

*Vide* Indian Law Reports, 3, Calcutta Series, p. 47—Delhi and London Bank Limited *vs.* Orchard.

### CALCUTTA HIGH COURT.

*Insolvency—Order and Disposition—Insolvent Act—11 and 12 Vict., c. 21, s. 24—Goods pledged by Insolvent and re-delivered to him on Commission Sale.*

*M.*, who carried on the business of a watch and clock-maker in Calcutta, borrowed from *D. M.* Rs. 6,000, for which he gave a promissory note, and, as collateral security for the payment of which sum, he pledged certain articles consisting of watches, clocks, &c., with *D. M.* The articles remained for some months in the custody of *D. M.*, who then re-delivered them to *M.* for sale on commission, the proceeds to be applied in liquidation of the debt. *M.* gave a receipt for the articles, and some of them were sold by *M.* on those terms. On the 2nd of May, 1877, *M.* filed his petition in the Insolvent Court, and such of the articles as remained unsold came into the possession of the Official Assignee. On an application by *D. M.* claiming the articles and praying for an order directing the Official Assignee to return them, it was alleged that it was customary for European jewellers in Calcutta to receive articles on commission sale, and it was contended that such receipt did not divest the true owners of possession. *Held*, the articles were rightly vested in the Official Assignee. On the facts, the insolvent was the true owner of the goods. *D. M.*'s interest ceased when he ceased to have possession of the goods; the receipt in this view only amounted to an agreement to sell and apply the proceeds in liquidation of the debt, and it could have been proved and a dividend recovered on it under the insolvency. Even if the interest of *D. M.* did not cease, the goods were in the order and disposition of the insolvent, there being nothing to show any publicity or notoriety in the change of possession of the goods. No amount of evidence would convince the Court that there was a custom of purchasing goods from a retail-dealer and leaving them with him for commission sale. *Semble*.—No such arrangement would be upheld as against the Official Assignee.

*Vide* Indian Law Reports, 3, Calcutta Series, p. 59.—*In re* Murray, an Insolvent and *Re* reports Dwarkanath Mitter.

*Jurisdiction of High Court—Act VI. of 1835—Act XXII. of 1869, s. 9—24 & 25 Vict., c. 67, s. 22; c. 104, ss. 9, 11, and 13—3 & 4 Will. IV., c. 85—16 & 17 Vict., c. 95—17 & 18 Vict., c. 77—Delegation, Power of.*

By Act XXII. of 1869, certain districts were removed from the jurisdiction of the High Court, and by s. 5 the administration of Civil and Criminal Justice was vested in such officers as the Lieutenant-Governor of Bengal should appoint. By s. 9 the Lieutenant-Governor was empowered to extend all or any of the provisions of the Act to the Cossyah and Jynteeah Hills. By a notification in the *Calcutta Gazette* of 4th October, 1871, the Lieutenant-Governor extended the provisions of the Act to the Cossyah and Jynteeah Hills, and directed that the Commissioner of Assam should exercise the powers of the High Court in the Civil and Criminal cases triable in the Courts of that district. The two prisoners were tried for murder in April, 1876, and were on conviction sentenced by the Chief Commissioner of Assam to transportation for life. On appeal by the prisoners to the High Court, *held* by the majority of a Full Bench (GARTH, C. J., MACPHERSON and PONTIFEX, JJ., dissenting), that the High Court had jurisdiction to entertain the appeal, and such jurisdiction was not taken away by Act XXII. of 1869.

*Per Curiam.*—The Governor-General in Council had power by legislation to remove the districts from the jurisdiction of the High Court.

*Per JACKSON, AINSLIE, and MARKBY, JJ. (KEMP, J., concurring).*—The Governor-General in Council had no power to delegate his legislative functions to the Lieutenant-Governor of Bengal in the way he had done in Act XXII. of 1869. The power of delegation cannot be considered as validated by any long course of practice, nor as sanctioned by the tacit recognition of Parliament: Act XXII. of 1869 is therefore so far invalid.

*Per MACPHERSON, J. (PONTIFEX, J., concurring).*—Such delegation is nowhere expressly prohibited, and does not bring the Act under any of the restrictive provisions of the Indian Council's Act.

*Per GARTH, C. J., and MACPHERSON, J. (PONTIFEX, J., concurring).*—The power of delegation now questioned had been exercised in many cases for a series of years previous to the passing of the Indian Council's Act, and that Act (the framers of which must have been cognizant of such course of practice) must be taken as impliedly approving of and sanctioning such practice, which it would otherwise have declared illegal.

*Per* GARTH, C. J., JACKSON, MARKBY, and AINSLIE, JJ. (KEMP, J., concurring).—The High Court has power to question the validity of the legislative acts of the Governor-General in Council.

*Per* MACPHERSON, J. (PONTIFEX, J., concurring).—The High Court has no such power if satisfied that the act is not within any of the prohibitions of the Indian Council's Act.

*Vide* Indian Law Reports, \*3, Calcutta Series, p. 63.—*Empress vs. Burah and Beek Singh*.

### MADRAS HIGH COURT.

#### *Contract to supply labor—Act XIII. of 1859.*

A contract to supply laborers and to get labor performed by them, even though the nature and extent of the work are not clearly specified, falls within the provisions of Act XIII. of 1859.

*Vide* Indian Law Reports, 1, Madras Series, p. 280.—*Rowson vs. Hanama Mestri*.

#### *Hindu lady—Stridhanam—Will.*

Where a Hindu lady had received presents of moveable property from her husband, from time to time, during their married life and, after his death, partly out of such property and partly from funds raised by the mortgage of jewels admitted to be her stridhanam, purchased immoveable property—*Held* that that was her stridhanam and that she consequently could dispose of it by will.

*Vide* Indian Law Reports, 1, Madras Series, p. 231.—*Venkata Rama Rau vs. Venkata Suriya Rau*.

#### *Criminal Procedure Code, sec. 46—Conviction—Order of 1st-class Magistrate—Reference.*

A magistrate to whom a case is referred for enhancement of punishment under Sec. 46 of the Criminal Procedure Code may order the committal of the case for trial by the Sessions Court.

*Vide* Indian Law Reports, 1, Madras Series, p. 289.—*In the matter of Chinnimarigadu*.

### BOMBAY HIGH COURT.

*Plea of limitation under Act XIV. of 1859—Civil Procedure Code (Act VIII. of 1859), Sections 26 and 32—Jurisdiction—Order of revenue officer—Cause of action.*

A defence of limitation under Act XIV. of 1859 cannot be raised for the first time, after there has been a remand on special appeal from the decree of the Court which has heard the cause on remand.

*Munshi Buzl Ruheem v. Sreenath Bose* (6 Calc. W. R. 178 Civ. Rul.) followed; *Kuria v. Gururav* (9 Bom. H. C. Rep. 282) distinguished.

*Parker v. Elding* (1 East 352) and *Lila v. Vasudeo* (11 Bom. H. C. Rep. 283), distinguished.

*Semble*, per WESTROPP, C. J., doubting *Saluji v. Rajsanji* (2 Bom. H. C. Rep. 162, A. C. J.), and *Davlata v. Peru* (4 Bom. H. C. Rep. 197, A. C. J.) the court ought not, even upon a special appeal in a case in which there has not been any remand, so to raise such question.

Per MELVILL, J.:—Cl. 16 of s. 1 of Act XIV. of 1859 extends to all suits in which a declaratory decree, and nothing more, is sought.

Per NA'NA'BHAI HARIDA'S, J.:—That clause does not extend to a suit in which the declaration sought is of a right in immoveable property.

Vide Indian Law Reports, 2, Bombay Series, p. 120.—*Moru Bin Patlaji v. Gopal Bin Satu*.

*Ancient lights—Obstruction—Notice—Delay—Acquiescence—Mandatory injunction—Damages—Demolition of building—Professional assistance.*

The re-erection of his house by the defendant, notwithstanding notice from the plaintiff, so as to darken some of the principal rooms of the plaintiff's house, making them unfit for occupation during the day without artificial light, is an injury which cannot be adequately redressed by an award of damages, and against which the court will grant relief by issuing a mandatory injunction, directing the defendant to pull down so much of the house as is necessary to stop the injury.

The probability of the defendant suffering a greater loss by the demolition of his house than the plaintiff, if his claim could be reduced to money, would suffer by being awarded a money compensation, is no ground for depriving the plaintiff of a mandatory injunction in his favour, except under special circumstances.

To determine what demolition of the house is necessary, the court executing the decree was directed to employ a professional man agreed on by the parties if they could agree, or nominated by the court if they could not.

Vide Indian Law Reports, 2, Bom. Series, p. 133.—*Jamnadas Shaakarlal and another v. Almaram Harjivan*.



*Hindu law—Illegitimacy—Succession—Gosavis—Custom—Maintenance.*

The rule laid down in *Rahi v. Govind* (I. L. R., 1 Bom. 97), that among the three regenerate classes, viz., Brahmans, Kshatriyas, illegitimate children cannot inherit, unless there be local usage to the contrary, is applicable to Gosavis.

A custom recognizing a right of heirship in an illegitimate son by an adulterous intercourse would be bad.

The right of an illegitimate son to maintenance out of his deceased father's property, cannot be decided in a suit which concerns a portion only of that property, and to which all persons in possession of the rest of the father's property are not parties.

*Vide* Indian Law Reports, 2, Bombay Series, p. 140—*Narayan Bharthi vs. Laving Bharthi and others*.

*The Indian Penal Code (Act XLV. of 1860), Section 217—Charge—Vagueness in charge.*

The accused was charged under Section 217 of the Indian Penal Code; but the charge did not distinctly state what the direction of the law was, which he disobeyed, and how he disobeyed it.

*Held*, that when accused has been convicted on a charge expressed in vague terms, the prosecution on appeal should be limited to the particular sense in which the charge has been understood at the trial.

*Vide* Indian Law Reports, 2, Bom. Series, p. 142.—*Imperatrix vs. Baban Khan Valad Mhaskoji*.

*Section 12, Clauses I. and II., Schedule III., Act VII. of 1870, Section 6, Clause IV., Articles (c) and (d) and Clause IX.—Act VIII. of 1859, Sections 29, 31, and 36—Suit for setting aside a mortgage-deed and injunction against the mortgagee—Valuation.*

There is no appeal against the order of a District Judge fixing the amount of the court fee chargeable on a plaint.

The right of appeal to which the plaintiff might have been entitled under sections 31 to 36 of Act VIII. of 1859 has been taken away by section 12, clause 1 of the Court Fees' Act VII. of 1870.

*Vide* Indian Law Reports, 2, Bom. Series, p. 145.—*Narayan Madhavrao Naik and another, vs. The Collector of Thana*.

ALLAHABAD HIGH COURT.

*Act XVIII. of 1873 (North-Western Provinces Rent Act), ss. 7, 95—Sir-land—Ex-proprietary Tenant—Mortgage of Proprietary rights in a Mahal followed by Sale—Ejectment—Mesne Profits—Trespasser—Jurisdiction—Civil Court—Revenue Court.*

A suit to eject a person from land as a trespasser, a person who has entered upon such land asserting his claim to the status of an ex-proprietary tenant, and to recover from him mesne profits, is a suit cognizable by the Civil Court.

The possession of sir-land by conditional mortgagees must be treated as the possession of the mortgagors; *held* accordingly that where the mortgagees of certain proprietary rights in a mahal, being in possession

of such rights, purchased the same at an auction sale, the sir-land included in the proprietary rights was held by the mortgagors at the time of the auction-sale, within the meaning of s. 7 of Act XVIII. of 1873, and that after the sale, in virtue of the provisions of that section, they became entitled to a right of occupancy in the sir-land.

Inasmuch as the mortgagors had a right of occupancy in the sir-land they could not be treated as trespassers for ejecting the mortgagees' tenant and taking possession; but inasmuch as instead of giving notice to the mortgagees of their intention to avail themselves of such right and to enter on the sir-land as tenants, at the same time offering to pay such rent as might, having regard to the provisions of s. 7, be properly payable by them, they entered on the sir-land and ousted the mortgagees' tenant, they rendered themselves liable for mesne profits.

*Vide Indian Law Reports, 1, Allahabad Series, p. 448.—Bakhat Ram vs. Wazir Ali.*

#### *Pre-emption—Hindu Widow—Wajib-ul-arz.*

A Hindu widow holding by inheritance her deceased husband's share in a village fully represents his estate as regards such share, and is entitled to prefer a claim to pre-emption as a share-holder in such village.

*Vide Indian Law Reports, 1, All. Series, p. 452.—Phulman Rai vs. Dani Kuari.*

#### *Non-joinder of Parties—Rejection of Pleint.*

A suit was instituted by one only of the partners of a firm in respect of a cause of action which had accrued to all jointly. Notwithstanding that objection to the non-joinder of the other partners was duly taken, the plaintiff contented himself with putting in a petition on behalf of the other partners intimating their willingness that the suit should proceed in the sole name of the plaintiff, instead of applying to the Court to add the other partners as plaintiffs. In appeal the High Court admitted the objection, and refused, under the circumstances, to add the other partners as plaintiffs.

*Vide Indian Law Reports, 1, All. Series, p. 453.—Dular Chand vs. Balam Das.*

#### *Redemption of Mortgage—Suit for Contribution—Misjoinder.*

The purchaser of a share in a mortgaged estate, who has paid off the whole mortgage-debt, in order to save the estate from foreclosure, can claim from each of the other mortgagors a contribution proportionate to his interest in the property, but he cannot claim from the other mortgagors collectively the whole amount paid by him.

*Vide Indian Law Reports, 1, All. Series, p. 455.—Hira Chand vs. Abdal.*

#### *Rival Decrees—Decree of Her Majesty in Council—Decree of the High Court—Execution of Decree.*

On appeal by *U*, the High Court set aside a decree which the sons of *K* had obtained in the Court of first instance against *U* and certain other persons, in a suit brought by them for possession of one-third of certain real property. At the same time on appeal by two of the other

persons aforesaid, it affirmed a decree which *U* had obtained against these persons and the sons of *K* for possession of two-thirds of the same property, in a suit in which he had claimed possession of the whole. It subsequently, on appeal by *U* against that portion of the decree made in the suit brought by him which dismissed his claim in respect to one-third of the property, reversed that portion and gave him a decree for the whole. The sons of *K* appealed to Her Majesty in Council only from the decree of the High Court setting aside the decree obtained by them in the Court of first instance for one-third of the property. Her Majesty in Council set aside this decree of the High Court and restored the decree of the Court of first instance. In the meantime *U* was put into possession of the whole property in execution of the decree of the High Court which he had obtained in the suit brought by him. When the sons of *K*, in execution of the decree of Her Majesty in Council, applied for possession of one-third of the property, *U* opposed the application on the ground that he was in possession under a decree of the High Court which had become final. *Held*, by a Full Bench of the High Court, that the decree of Her Majesty in Council must be executed, notwithstanding that its execution involved the disturbance of the possession obtained by *U* under the decree of the High Court which had become final.

*Vide* Indian Law Reports, 1, All. Series, p. 456.—(Full Bench) *Udai Singh vs. Bharat Singh*.

*Act XVIII. of 1873 (North-Western Provinces Rent Act), s. 7—Expropriatory Tenant—Sir-land—Mortgage of Proprietary rights in a Mahal.*

Where a person mortgaged his proprietary rights in a mahal, which rights consisted of certain lands occupied by him, covenanting to give the mortgagee possession for the purpose of cultivation and the payment of Government revenue, and being at liberty to redeem the lands at any time at the end of the month Jaith, such person could not resist a claim on the part of the mortgagee for possession of the lands on the ground that he had a right of occupancy in the lands under s. 7 of Act XVIII. of 1873, such section not being applicable, and contemplating something more than a mere temporary transfer of proprietary rights.

*Vide* Indian Law Reports, 1, All. Series, p. 459.—*Bhagwan Singh vs. Murl Singh*.

*Act VIII. of 1873 (Northern Indian Canal and Drainage Act) s. 70—Act XLV. of 1860 (Indian Penal Code), s. 65—Act X. of 1872 (Criminal Procedure Code), s. 309—Act I. of 1868 (General Clauses Act) s. 5.*

S. 309 of the Criminal Procedure Code does not extend the period of imprisonment which may be awarded by a Magistrate under s. 65 of the Indian Penal Code, it only regulates the proceedings of Magistrates whose powers are limited.

*Vide* Indian Law Reports, 1, All. Series, p. 461.—*The Empress of India vs. Darba and others*.

## CALCUTTA HIGH COURT.

*The 27th March, 1878.*

PRESENT :

The Hon'ble Louis S. Jackson, C. I. E., and the Hon'ble H. S. Cunningham.

RAJ COOMAR SINGH and another, *Petitioners,**versus*DINONATH GHUTTUCK, *Opposite party.*

*S. 530 of the Code of Criminal Procedure—Decree of Civil Court binding whether appealed or not—Mischief—S. 425, Penal Code—Wrongful loss—S. 23, Penal Code—S. 359 of the Criminal Procedure—Rioting—S. 141, Penal Code—Right of self defence—Private Nuisance, Abatement of.*

*Per JACKSON, J.*—S. 530 of the Code of Criminal Procedure has no application in a case in which there is no question of possession and the disputed land is in the joint possession of the contending parties, and where the only question is whether one of them, being a joint owner, is at liberty to make use of the disputed land in such a manner as to cause what the other joint owner chooses to consider an annoyance and what is against his will.

When after a Criminal Court passes orders under s. 530 of the Code of Criminal Procedure, the Civil Court adjudges the rights of the parties, the magistrate as well as the parties are bound to respect the decision whether it has been appealed against or not.

Where a *Nahabatkhana* was erected upon a joint land and the people of one of the owners broke it, and the Criminal Court convicted the latter of committing mischief under s. 425 of the Penal Code, it was held that as the only act done by the accused persons was to change the situation of the bamboos in so far as to put an end to their continuance in the form of a structure and that as the former was not under the Civil Court's decree entitled to have those bamboos put together in the form of a *nahabatkhana* there was no causing of wrongful loss in the act done by the accused inasmuch as "wrongful loss" is defined in s. 23 of the Penal Code to be "loss by unlawful means of property to which the person losing it is legally entitled."

S. 359 of the Criminal Procedure Code does not enable the magistrate to enquire generally into what the defence of the accused person is to be and to consider whether on learning the nature of the defence he is absolutely to abstain from summoning the whole of the witnesses cited by the accused.

Where five or more of the ordinary servants of a person assemble on a land of which he is a joint owner, for the purpose of resisting the infraction of their master's right, and where no force or violence was used, it was held that they could not be convicted of rioting under s. 141 of the Penal Code.

*Per CUNNINGHAM, J.*—The accused were exercising a legal right of self-defence in preventing the making of a structure which was forbidden by a competent Court. It is the remedy familiar to English law of abating a private nuisance. The conviction must therefore be quashed.

JACKSON, J.—The conviction which led to the granting of this rule was first brought before a Division Bench of this Court on the 26th of October last, on which occasion, the learned Judges who heard the application directed that the complainant Dino Nath Ghuttuck should be called on to show cause why the sentences passed on the petitioners should not be set aside, and that in the mean time the petitioners be released on bail. The rule issued on the 26th of October for some cause or other did not come on for argument before the 18th of January. It was then observed that the petitioners had a right of appeal, and the Court, considering that the right which they had under the law should be first resorted to, discharged the rule, and observed that the Sessions Judge would exercise a wise discretion if, under the circumstances, he admitted the appeal, although the regular time had elapsed. On that an appeal was made to the Sessions Judge; and that officer, so far from affording any relief to the petitioners, dismissed their appeal and doubled the punishment indicted upon them by the Magistrate, and also directed that further proceedings be taken against the employer of the petitioners. On that, a further application has been made to this Court, and we have now to consider the propriety of the original conviction, and also of the further order passed by the Court of Session.

I think it necessary, in dealing with this case, to go a little further back, to show what the history of this matter has been, because it seems to me, of some importance that the previous transactions and orders should be considered as enabling us to judge of the course taken by the parties, and by the Magistrate. The subject of dispute is the mode of enjoyment of a small piece of land which, as I learn from a small sketch which has just been handed to me, and of which the general correctness I understand, is admitted by both parties, is situated to the south of the house of Shama Churn Lahiree and close to it, but separated from the house by the Government road. This piece of land is situated at a distance of about two minutes' walk from the house of Gopee Kishto Gossain, and this Gopee Kishto is a joint-owner to the extent of eight annas in the land. Shama Churn being co-owner to the extent of four annas. There is also a third owner who is not before us. It appears that some time before the Doorga Poojah in 1876 Shama Churn Lahiree desired to use this joint piece of land for the purpose of erecting upon it a platform supported by bamboos, which is called by the high-sounding name of a *Nahabatkhanah*. It was intended for musicians to sit upon, and the music to be performed there was probably connected with the approaching Poojah. Some dis-

pute having arisen in consequence of Gopee Kishto Gossain being unwilling that the land should be so occupied, the Magistrate of the Sub-Division held an inquiry, and made an order under Section 530 of the Code of Criminal Procedure, adjudging exclusive possession of that part of the land on which this *nahabatkhanah* stood, to Shama Churn Lahiree. In consequence of that Gopee Kishto Gossain brought a suit in the Court of the Subordinate Judge—a suit of which the nature and the result are not stated with sufficient accuracy by the Courts below. The object of it was to have it declared that Gopee Kishto Gossain was entitled to joint possession over the whole of this piece of land, and that Shama Churn Lahiree was not entitled to erect a *nahabatkhanah* thereon, and it was specially prayed that this declaration should be granted, and that the *nahabatkhanah* should be broken down. The Subordinate Judge made a decree in all respects according to the prayer of the plaintiff, that is to say, his decree was that the plaintiff's suit be decreed. This decree of course ought to have been more carefully expressed, and the plaintiff, by his pleader, ought to have taken care that effectual relief was granted under it. All that was done for that purpose was that a decree having been made on the 19th of May 1877, the Nazir proceeded to the spot, and by planting a bamboo, gave what is called symbolical possession. The *nahabatkhanah*, it appears, was not pulled down, but remained where it was. The very natural consequence was that on the approach of the Doorga Poojah of 1877 the dispute was renewed, and several servants of Gopee Kishto Gossain, acting, doubtless, under their master's instructions, went to the place and pulled down this erection. On that Shama Churn Lahiree complained. The servants were brought before the Magistrate, and were convicted of the offence of mischief, and fined. That occurred on the 28th September. On the morning of the 8th of October the servants of Gopee Kishto Gossain, getting up early in the morning, found certain *gharamis* in the employ of Shama Churn Lahiree engaged in setting up this *nahabatkhanah* again. The men who made this discovery summoned others of their fellow-servants and they not only protested against the erection, but pulled down the bamboos, took them out of the ground, thrusting aside the servants of Shama Churn Lahiree and throwing to the ground another servant who had climbed upon one of the bamboos and who had clung to it. Upon this a further complaint was made before the Joint Magistrate of Serampore on the afternoon of the 9th. He immediately issued a summons, and had the accused brought before him. We gather from a part of

the affidavit before us that the Magistrate, in the first instance, intended to deal with the matter summarily, but that on the application of the pleader for the accused, he agreed to take it up and deal with it in the usual form. At the same time he altered the charge against the accused to one of rioting, which of course, not being one of the offences specified in Section 222 of the Code of Criminal Procedure, could not be dealt with in the summary form. One of the witnesses was examined before the charge was framed, it appears, and another afterwards. The defendants were called upon for their defence, and they named several witnesses. Now, it is stated, but the Magistrate denies the statement, and I very willingly accept his denial, that in the first instance he made a verbal refusal to summon these witnesses. However, summons did issue in the following morning, but the witnesses were not to be found. Upon that the accused applied to the Magistrate to grant a further time for the appearance of the witnesses, representing that the time was that of Poojah when people were disinclined to attend the Court, and that they had not had a fair opportunity of procuring the attendance of their witnesses. The Magistrate, for reasons which he stated, declined to allow further time, and on the 12th of October proceeded to convict the prisoners of the offence of rioting, under section 147 of the Indian Penal Code, and sentenced each to imprisonment for three months. The result of their appeal to the Court of Session was, as I have already said, that the Sessions Judge considered the sentence too lenient and directed that the prisoners should each undergo rigorous imprisonment for six months.

It appears to me, in the first instance, that the Joint Magistrate was in error in making any order in this matter under Section 530 of the Code of Criminal Procedure. It seems to me that the subject-matter was one to which that Section could have no application. There was really no question of possession. The land was in the joint possession of the disputants, and the only question was whether one of them, being a joint owner, was at liberty to make use of the land in such a manner as to cause what the other joint owner chose to consider an annoyance, and against the will of that joint owner. In fact, the Magistrate himself, in a passage of his judgment, seems to furnish an excellent reason why he should not have exercised jurisdiction under that Section. Adverting to an argument of the pleader for the accused as to the right of Gopea Kishto Gossain to forbid this mode of enjoyment, he says:— "I am unable to accede to the application of this doctrine. The Vakeel



says that the doctrine would be monstrous, that a co-sharer might build a house upon land held in joint partnership for his sole use," and so on. Then he goes on to say—"The objection does not apply here, for a *Nahabatkhana* is not a house. It is the flimsiest and most unsubstantial of structures. It occupies the air rather than the earth. It is an elevated platform on which musicians may sit. The grass can grow under it and goats and cattle graze there." The Magistrate's own argument therefore was that Shama Churn Lahiree in erecting this *Nahabatkhana* proposed to occupy the air; and although Section 530 applies to land and water, it certainly does not comprehend the air. I have no doubt that the order under Section 530 was beyond the power of the Magistrate, and ought not to have been made. The Magistrate, however, not only made that order but has relied upon it in the proceedings now before us, because he has ordered a copy of it to be filed on the record, although it is manifest, from what afterwards took place, that the order had ceased to have any effect whatever, because the result of the order which he made was that Gopee Kishto Gossain being affected by it, immediately brought a suit in the Civil Court, and that Court declared that the Defendant had no right to erect the *Nahabatkhana* in that situation, and in fact decreed that it should be removed. But as an order under Section 530 is only valid until the person to whom possession is given is ousted by due course of law, and as the effect of that judgment of the Civil Court certainly as to oust Shama Churn Lahiree, the order of the Magistrate ought not to have been referred to in any further proceedings. That decree of the Civil Court has not I understand been set aside on appeal. But whether it has been appealed or not, and whatever may be the result of such appeal, it is not our business at present to consider the correctness of that decision. Undoubtedly, as far as the parties were concerned, it was a valid decision of a competent Court, and the Magistrate as well as the parties were bound to respect it. In respect of what occurred in September 1877, it appears to me that the first conviction by the Deputy Magistrate was erroneous. The accused persons were convicted of mischief by the Magistrate. Now, the definition of mischief is to be found in Section 445 of the Indian Penal Code which is this:—"Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property or any such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously, commits mis-



chief." Now as far as I can see, the only act done by the accused persons in that case was to change the situation of the bamboos (because they were not otherwise destroyed or injured) in so far as to put an end to their continuance in the form of a structure. Then looking to the words "wrongful loss" as defined in Section 23 of the Indian Penal Code, we have "wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled." Now it is clear from the decision of the Civil Court which was then in force, that Shama Churn Labiree was not at that time legally entitled to have those bamboos put together in that place in the form of a *Nahabatkhanah*, and consequently there was no causing of wrongful loss in the act done by the accused persons. It seems to me, therefore, that if that conviction had been brought before this Court in the exercise of its power of revision, the conviction would have been set aside. But the employer of the accused appears throughout these proceedings to have been singularly ill-advised. He had an illegal order made against him under Section 530 which was allowed to remain untouched. He brings a suit in the Civil Court of which he fails to obtain the full effect. His servants illegally suffer conviction of the offence of mischief, and that conviction is also allowed to pass unquestioned. He seems to have been then advised to cover this piece of ground with logs of wood and bricks and other materials which was undoubtedly an unjustifiable act. His servants being then charged with rioting, it appears that their Counsel instead of simply relying upon the decision of the Civil Court, thought fit to argue before the Magistrate at length as to the question of right. Finally upon the conviction taking place, instead of going at once to the Appellate Court, the accused were advised to come before this Court. A procedure which undoubtedly prejudiced them in the mind of the Sessions Judge, and which has added very much to the costs and anxieties of these proceedings.

I am now coming to the particular proceedings which are before us. These petitioners were charged with the offence of rioting. Now first as to the procedure. It appears to me that the accused were undoubtedly prejudiced by the haste with which the prosecution was pushed on. I am unable to see for what public object this was done, or what was the particular importance of the case to which the Magistrate refers. It seems to have been in the eyes of the Magistrate of particular importance that the employer of the accused persons should not gain his object, and from that it seems to result that he thought it of great importance that the complainant should gain his object, that is to say,

whatever the result of this prosecution might be, Shama Churn Lahiree the virtual complainant in this case, should be enabled to erect and keep erected this *Nahabatkhanah* for such purposes as he thought desirable, and the Magistrate, in a passage of his explanation which was submitted to this Court sometime ago, says that on looking back to the proceedings, he is unable to see what other course he could have taken. I confess it does seem to me strange considering that this question had been already submitted to a Civil Court which was competent to entertain it, and that that Court, whether rightly or wrongly, had determined that Shama Churn Lahiree was not entitled to that particular form of enjoyment, it does seem to me strange that it should not have occurred to the Magistrate that the right solution of his difficulty would be to restrain Shama Churn Lahiree from doing that which the Civil Court had decided he was not entitled to do, until at any rate, a further decision upon the matter should have been obtained. I have now to observe upon the refusal of the Magistrate to allow time to the accused for the appearance of their witnesses. The Magistrate and, I observe, also the Sessions Judge relies upon the alleged discretionary power of the Magistrate in this matter. Now this being what is termed a warrant case, the duty of the Magistrate in this particular is stated in the 219th Section of the Code of Criminal Procedure. That Section says—"The Magistrate shall, subject to the provisions of Section 362, summon any witness, and examine any evidence that may be offered in behalf of the accused person to answer or disprove the evidence against him, and may, for this purpose, at his discretion, adjourn the trial from time to time as may be necessary." Section 362 says—"In warrant cases the Magistrate shall ascertain from the complainant or otherwise the names of any persons who may be acquainted with the facts and circumstances of the case, and who are likely to give evidence for the prosecution, and shall summon such of them to give evidence before him as he thinks necessary. The Magistrate shall also subject to the provisions of Section 359 summon any witness and examine any evidence that may be offered in behalf of the accused person to answer or disprove the evidence against him, and may, for that purpose, at his discretion, adjourn the trial from time to time." Section 359 to which reference is there made says:—"If the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay or of defeating the ends of justice, he may require the accused person to satisfy him that there are reasonable grounds for believing that such witness is material."

Now I understand this Section 359 to mean that if among the persons named by the accused as witnesses to a defence, the Magistrate considers that any particular witness is included for the purpose of vexation and delay, he is to exercise his judgment and enquire whether such witness is material. I have never heard that it was intended by that provision to enable the Magistrate to enquire generally into what the defence of the accused person is to be, and to consider whether on learning the nature of the defence he is absolutely to abstain from summoning the whole of the witnesses cited by the accused. I am aware of no warrant for the exercise of any such sweeping authority. Setting that aside, can it be said here that there was any purpose of vexation or delay for which these witnesses were summoned? The trial was proceeding with great rapidity. The offence of which these prisoners were charged was very serious. The law enabled them to call witnesses in order to disprove or answer the case made against them, and considering what the time of the year was at which the first attempt to procure the attendance of these witnesses had been made, it does seem to me that it would have been reasonable to allow a further time for that purpose, and I moreover think it probable that by reason of such time not having been allowed, the prisoners were prejudiced in their defence, because this was not a simple question, it was one which depended somewhat upon minute considerations. The conduct of the parties, the mode in which one side or the other had acted, was of the greatest importance in determining, firstly, whether the accused had committed any offence or not, and secondly, what was the nature and extent of that offence. The Magistrate indeed says, in order to justify his refusal, that the accused had confessed that with which they were charged. The accused had confessed no such thing. They were charged with rioting. That which they admitted was that they had pulled up these bamboos and displaced the erection. That was the long way from confessing the offence of rioting.

Another point on which I think we are bound to remark is, that the Magistrate having at his command the means of obtaining evidence which was presumably impartial, that is to say, the evidence of his own Police officers, did not either call or examine any one of them. The witnesses for the prosecution were I believe only two, and I should have expected in a case like this, that the Magistrate should have resorted to the evidence of the Police officers, as presumably free from leaning or bias on one side or the other. So far as to the procedure in this case.

I now turn to the conviction. The accused have been convicted of the offence described in Section 141 of the Indian Penal Code. After a good deal of consideration, I am unable to satisfy myself that that which they did, came under that Section. Rioting, according to the Indian Penal Code, consists of force used in the prosecution of a common object of an unlawful assembly. We must therefore find that there was an unlawful assembly, that they had a common object, and that force was exercised in the prosecution of that object. Now, I think it highly probable that on this occasion there were five or more persons assembled, but who were these persons? They were not persons assembled together for any unlawful purpose, nor were they persons summoned together for the purpose of committing a breach of the peace. They were the ordinary servants, and probably relatively speaking, only a few of the ordinary servants of this Baboo Gopee Kishto Gossain. One of them discovers that stealthily the other party had in the course of the night, put up this structure which the Civil Court had declared he was not authorized to do, and he calls other servants to assist him in remonstrating and in removing this structure which was there illegally erected. It was suggested that this matter came either under the third or the fourth clause of Section 141. Now the third clause specifies the object to be that of committing any mischief or criminal trespass or other offence. In regard to mischief, as I have already said with reference to the previous conviction, it appears to me that there was no mischief. In regard to criminal trespass, the allegation appears to me to be absurd. The accused persons were only where they were entitled to be—on their master's own land. They had not gone there, nor did they remain there for the purpose of trespassing or for any other unlawful purpose. Then it is said that perhaps they had gone there for the purpose of enforcing some right or supposed right. It seems to me they had not gone there for any such purpose, but that the other side having gone there for the purpose of enforcing a right which he perfectly knew the Court had adjudged him not to possess. These persons merely representing their master, went there for the purpose of resisting that infraction of their master's right. It is admitted that no particular force or violence was used, and that this was the case, might be further inferred from the fact that the Police officers who were on the spot saw no occasion to interfere. It appears to me therefore, that there was no cause for convicting these persons of the offence of rioting inasmuch as they were not there as members of an unlawful assembly, nor for any unlawful

purpose. I think, therefore, that the conviction, as well as the procedure under which the conviction was had, was illegal, and ought to be set aside.

I have only now to make one or two observations upon what had occurred in the Court of Session. The errors into which the Magistrate has fallen are easily explained by the circumstance that he left himself, whether rightly or wrongly, impressed with the duty of maintaining not only the peace of the District, but also the authority of his own Court, and also by the fact that he had taken a large part in previous transaction which led up to this conviction, and therefore that which he did, although it was, as I think, erroneous, was far from unnatural. But these considerations do not apply to the Court of Session. The Sessions Judge was an officer of infinitely more experience. He was not affected by the necessity of maintaining the authority of the Magistrate's Court, or by any participation in the previous proceedings, and yet he not merely fails to point out the mistakes which the Magistrate had committed, but he actually goes beyond him in the line which the Magistrate adopted. The Joint Magistrate had certainly shewn that he was not slow to vindicate the respect due to his own Court, and he passed what he avowedly considered a severe sentence when he punished the petitioners with rigorous imprisonment for three months. I am quite unable to see upon what grounds, or for what reasons the Sessions Judge not merely affirmed but doubled that punishment. I think therefore, that this rule must be made absolute, and the conviction and the proceedings quashed. The proceedings taken by the Joint Magistrate against Gopee Kishto Gossain and Nundo Lall Gossain must accordingly be stopped.

MR. JUSTICE CUNNINGHAM.—I concur in setting aside this conviction.

The facts in the case establish that certain co-owners were doing that, in the enjoyment of the common property which as between the parties had been decided by a competent Court to be, and therefore must be regarded by us as being illegal, viz., erecting a platform the erection of which the Court had forbidden. Thereupon the other co-owners came in, and without violence or unnecessary force, and with no breach of the peace, abated the nuisance by pulling up certain bamboos of which the structure, so far as the building had gone, consisted. For this, they have been convicted of being members of an unlawful assembly, and sentenced to three months' imprisonment. This sentence was on appeal enhanced to six months.

It appears to me that the accused were merely exercising the remedy familiar to English law of abating a private nuisance. This right is thus described in Stephen's Commentaries, 5th Edition, III., 354.

The rule was laid down by Lord Denman in *Perry vs. Fitzhove*, 8 A and E, 775. In that case a commoner whose right of pasturage was interfered with by a building erected upon it, came and pulled it down "about the plaintiff's ears" while he and his family were actually in it; and it was held that the serious risk of human life involved, and the consequent imminent danger to the peace had, according to the analogy of the law of distress, the effect of rendering the plaintiff's act unlawful.

In the present case there appears practically to have been no violence and no such danger of any breach of the peace—indeed, the police were standing by and looking on while the abatement took place, and the act of abatement was therefore, in my opinion, legal. The same view of the law appears to be reproduced in the I. P. C. "Mischief" is defined in Section 425 I. P. C. as the causing any change in property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously with an intent to cause wrongful loss to any person, and explanation 2 shows that mischief may be committed by an act affecting property of which the person committing it, is joint owner with others. Under this definition the act of the complainants in erecting the structure was, as I regard it, mischief.

Then, by Section 99 I. P. C., there is a right of self-defence of property, moveable or immoveable, against an act which falls under the definition of "mischief." I do not think that the 3rd exception in Section 99 applies, as the accused had the right to prevent the structure being made, which they could not have done if they had waited to go to the Court for an injunction.

The observations of Couch, Chief Justice, in a similar case in 19, W. R., C. R., 66, seem applicable to the accused in this case.

Under this view I think the accused were exercising a legal right of self-defence, consequently that there was no criminal force, no unlawful assembly, and no riot, and that the conviction must be quashed.

## PRE-EMPTION.

*Lecture XVIII, on Mahomedan Law, by Babu S. C. Sircar, Tagore Law  
Professor for 1878.*

SHUFA or right of pre-emption is a power of possessing property which has been sold to another by paying a price equal to that settled or paid by the purchaser.\*

*Principle (dcxxv.)* The right of pre-emption applies not to moveable but to immoveable property (*akār†*), divisible or indivisible (*a*), and can be exercised when the latter is transferred in any shape for a consideration (*b*), even as a grant or gift for a consideration expressed,‡ or in a compromise (*c*).

(*a*) A privilege of *shufa* takes place with respect to immoveable property, notwithstanding it be incapable of division, such as a bath, a mill, or a private road. According to *our* tenets the grand principle of *shufa* is the conjunction of property, and its object to prevent the vexation arising from a disagreeable neighbour; and this reason is of equal force whether the thing be divisible or otherwise. *Hidāyah*, vol. iii., page 591.

It is observed in the abridgment of *Kadūri* that *shufa* does not affect even a *house* or *trees* when sold separately from the ground on which they stand. This opinion (which is also mentioned in the *Mabsut*) is approved; for as buildings and trees are not of a permanent nature they are therefore of the class of *moveables*.—*Hidāyah*, vol. iii., pages 591 & 592.

(*b, d*) The privilege of *shufa* is not admitted in the case of grants, unless when the grant is made for a consideration, in which case it is in effect ultimately a sale. Still, however, the privilege of *shufa* cannot be admitted

\* The original meaning of *Shufa* is conjunction.—*Durr ul-Mukhtār*, page 697.

In law it is a right to take possession of a purchased parcel of land for a similar (in kind or quality) of the price that has been set on it to the purchaser.—*B. Dig.*, page 471.

† See the case cited at the end of this Lecture.

‡ The right of pre-emption takes effect with regard to property, whether divisible or indivisible; but it does not apply to moveable property, and it cannot take effect until after the sale is complete, as far as the interest of the seller is concerned.—*Maon. M. L.*, Chap. iv., Princ. 3.

The right of pre-emption takes effect with regard to property sold, or parted with by some means equivalent to sale, but not with regard to property the possession of which has been transferred by gift, or by will, or by inheritance; unless the gift was made for a consideration, and the consideration was expressly stipulated, but pre-emption cannot be claimed where the donor has received a consideration for his gift, such consideration not having been expressly stipulated.—*Maon. M. L.*, Chap. iv., Princ. 2.



unless both parties have obtained possession of the property transferred to them by the terms of the grant (nor if the thing granted on either side be an indefinite part of any thing;) for a grant on condition of a return is still a grant in its *beginning*, as has been already explained in treating of gifts. It is further to be observed that the privilege of *shufá* cannot be admitted, unless the return be expressed as a condition on making the grant; for if it be not so expressed, and the parties give to each other reciprocal presents, these presents on both sides are held as pure *grants*, although each of them having met with a requital of his generosity, neither is allowed the power of retreating.—*Hidáyah*, vol. iii., pages 594 & 595.

(c.) If a defendant compromise a suit by resigning or making over a house to the plaintiff, after having either denied his claim or acknowledged it, or refused to answer it, the right of *shufá* is established with respect to the house; because as the plaintiff here accepts the house in consideration of what he conceives to be his right, he is therefore [in adjudging the right of *shufá* against him] dealt with according to his own conceptions.—*Hidáyah*, vol. iii., page 594. So—

*Principle* (dcxxvi.) The right of pre-emption does not take effect with respect to the property transferred by a grant or gift without consideration *expressly stipulated* (d). It does not also take effect to the property made over as a hire or reward, or as a compensation for *khulá*, or as a dower (e), though it takes effect with respect to the property sold in order to pay a dower (f).

(d.) See note (b).

(e.) When a man acquires a property in lands for a consideration, the

#### ANNOTATIONS.

dcxxv., dcxxvi. Among its conditions are the following:—1st. There must be a contract of exchange, that is, a sale or something that comes into the place of a sale, otherwise there is no right of pre-emption. So that the right does not arise out of gift, charity, inheritance, or bequest. But if the gift be a *hiba bakhari-ul-hood*, or with a condition that something shall be given in exchange for it, and mutual possession is taken, the right arises. If possession is taken by one of the parties and not by the other, there is no right of pre-emption according to our three masters. And if a mansion is given without any condition for an exchange, but the donee gives another mansion in exchange for it, there is no right of pre-emption with regard to either. But pre-emption is due on a mansion which is the exchange for a composition, whether the composition be after an acknowledgment or a denial of the claim, or silence has been observed with regard to it; and it is also due on the mansion compounded for, when the composition is after an ac-



privilege of *shufâ* takes place with respect to it. The privilege of *shufâ* cannot take place relative to a house assigned by a man as a dower to his wife, or by a woman to her husband as the consideration on which he is to grant her as a divorce, or which is settled on a person as his hire or reward. — *Hidâyah*, vol. iii., page 592.

(f.) If a man marry a woman without settling on her any dower, and afterwards settle on her a house as a dower, the privilege of *shufâ* does not take place, the house being here considered in the same light as if it had been settled on the woman at the time of the marriage. It is otherwise where a man sells his house in order to discharge his wife's dower *either proper or stipulated*, because here exists an exchange of property for property. — *Hidâyah*, vol. iii., page 593.

*Principle* (dcxxvii.) The right of pre-emption does not take effect with respect to a sale made under condition of option\* (g), though it takes effect with the *purchase* made under such condition (h).

(g.) If a man *sell* his house under a condition of option,\* the privilege of *shufâ* cannot take place with respect to that house, the power reserved by the seller being an impediment to the extinction of his right of property, but when he relinquishes that power the impediment ceases, and the privilege of *shufâ* takes place, provided the *Sharî* prefer his claim *immediately*. This is approved. — *Hidâyah*, vol. iii., page 595.

(h.) If, on the contrary, a man *purchase* a house under a condition of option, the privilege of *shufâ* takes place with respect to it; for such a power reserved by the *purchaser* is held, in the opinion of all the learned, to be no impediment to the extinction of the *seller's right* of property, and the right of *shufâ* is founded and rests upon the extinction of the *seller's right* of property, as has been already explained. — *Ibid.*

*Principle* (dcxxviii.) The right of pre-emption does not apply to a transfer made under an invalid sale; on the contrary, the maker of such sale so long as he has not delivered the property to the purchaser can himself exercise his right of

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knowledge of the claim, though it is not due if the composition have taken place after a denial of the claim. 2nd. — There must be an exchange of property for property. 3rd. — The thing sold must be *akâr*, or what comes within the meaning of it, whether the *akâr* be divisible, or indivisible, as a bath, or well, or a small house. — *Fatawa Alamgîr*, vol. v., page 249. — *B. Dig.*, pages 471 & 472.

\* See pages 194 & 197 of the *Mahomedan Law* by Shams Churn Sircar.

pre-emption over the transfer of an adjacent property. But after his delivering to the purchaser the subject of such sale, the latter is vested with the right of the adjacent property; and it is not divested of him and re-vested in the seller so long as the latter does not resume the property transferred by him under the invalid sale.

The privilege of *shufâ* cannot take place regarding a house transferred by an invalid sale, either before or after the purchaser obtaining possession of it; for, before the purchaser obtains possession, the house belongs as usual to the seller, and his right of property is not extinguished; and after he has obtained possession there is still a probability that the bargain may be dissolved, since the law admits the dissolution of a sale in a case of invalidity, in order to obviate such invalidity, an effect which could not be produced if the privilege of *shufâ* were allowed.—Hidayah, vol. iii., page 596.

If the house adjacent to one which has been transferred by an invalid sale be sold whilst the one so transferred is still in the possession of the seller, he [the seller] is the *Shafi* of the adjacent house, because of the continuance of his right in the other.—Hidayah, vol. iii., page 597.

*Principle* (dcxxix.) But when the seller's right in the property transferred under an invalid sale is entirely cut off and established in the purchaser, then of course the right of pre-emption can be exercised.

If, however, the purchaser put an end to the possibility of the dissolution of any particular act, such as by erecting buildings on the ground or the like, the privilege of *shufâ* may take place, since the impediment then no longer exists.—Hidayah, vol. iii., page 596.

The proper time for making the demand of pre-emption in the case of an invalid sale is not that of the purchase, but when the seller's right is entirely cut off.—B. Dig., page 482.

*Principle* (dcxxx.) The right of pre-emption once relinquished cannot afterwards be resumed.†

If a man purchase a house, and the *Shafi* relinquish his privilege, and the purchaser afterwards reject it in virtue of an option of inspection, or a condition of option,‡ or by a decree of the magistrate in virtue of an option from defect,§ the *Shafi* is not entitled to claim his privilege, whether the

\* I suppose on possession being taken with the seller's permission when the purchaser becomes the proprietor.—Note by Mr. Baillie.

† See, however, p. 536 of the *Mahomedan Law* by S. C. Sircar.

‡ See pp. 496 & 599

§ See p. 501

Do.

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man had ever taken possession of the house or not. *Hidāyah*, vol. iii., page 598.

*Principle* (dcxxxi.) If, on the contrary, the purchaser reject the house on discovering a blemish in it after having taken possession without the decree of the Kazi, or if the seller and purchaser agree to dissolve the contract, the privilege of *shufá* is established to the *Shafi*.

Because in those instances the rejection or dissolution is a *breaking off* with respect to the seller and purchaser, inasmuch as they are their own masters, and moreover *will* and *intend* a breaking off: yet with respect to others it is not a *breaking off*, but is rather in effect a *new sale*, since the characteristic of sale, namely, an *exchange* of property for property with the mutual consent of the parties exists in it; and as the *Shafi* is *another*, it is therefore a *sale* with respect to him, whence his right of *shufá* must be admitted.—*Hidāyah*, vol. iii., page 598.

*Principle* (dcxxxii.) The right of pre-emption (*shufá*) belongs in the first place to the co-sharer in the property; secondly, to a sharer in the rights and appurtenances of the property; and thirdly, to the neighbour (i).\*

(i.) The right of *shufá* appertains 1—to a partner in the *property* of the land sold; 2—to a partner in the *immunities* and *appendages* of the land (such as the right to *water* and to *roads*); and 3—to a *neighbour*. The right of *shufá* in a partner is founded on a precept of the Prophet, who has said—"The right of *Shufá* holds in a partner who has not divided off and taken separately his share." The establishment of it in a *neighbour* is also founded on a saying of the Prophet—"The neighbour of a house has a superior right to that house, and the neighbour of lands has a superior right to those lands; and if he be absent, the seller must wait his return, provided, however, that they both participate in the same road," and also—"A neighbour has a right superior to that of a stranger in the lands adjacent to his own."—*Hidāyah*, vol. iii., page 562. Hence—

\* The right of pre-emption may be claimed by all descriptions of persons. There is no distinction made on account of difference of religion. The following persons may claim the right of pre-emption in the order enumerated: a partner in the property sold, a partner in its appendages, and a neighbour. All rights and privileges which belong to an ordinary purchaser belong equally to a purchaser under the right of pre-emption.—*Macn. M. L.*, Chap. 1, Part 4-6.

*Principle* (dcxxxiii.) Where the co-sharer in the property itself is a claimant, the sharer in the rights and appurtenances is not entitled to the privilege of pre-emption, and where he is a claimant, his claim is preferable to that of the neighbour (j).

(j.) A partner merely in the road and rivulet, or a neighbour, cannot be entitled to the privilege of *shufâ* during the existence of one who is a partner in the property of the land, for his is the superior right as has been already shown.—Hidâyah, vol. iii., page 564.

A person who is the joint proprietor of only a part of the property sold, (such as a partner in a particular room or wall of a house) as he has a right superior to one who is neighbour to that particular part, so likewise has he a right superior to one who is a neighbour to the rest of the house. This is an approved maxim of Abu Yusuf; for the conjunction holds stronger in the case of a person who is a joint proprietor of only a part of the house, than in that of one who is merely a neighbour. It is necessary that the road or rivulet, the joint participation in which gives a claim to the privilege of *shufâ*, be private.—Hidâyah, vol. iii., page 565.

When within a mansion, which is situate in a street without a thoroughfare, and which has several owners, there is a house belonging to two persons, and one of them sells his share in it. The right of pre-emption belongs first to the partner in the house, then to the partners in the mansion, and next to the people in the street, who are all alike. If all these give up their right it belongs to the *muldâk*, or contiguous neighbour, by whom is meant the neighbour behind the mansion who has a door opening into another street.\*

A mansion belonging to two persons is situate in a street which has no thoroughfare, and one of the partners sells his share to a stranger: the right of pre-emption belongs first to the partner in the house, then to the partner in a party wall, then to all the people in the street equally, and then to the neighbour in the mansion behind that which is sold.\*

*Principle* (dcxxxiv.) A companion (that is a *khalât*) in a way is preferred for pre-emption to a companion in a channel of water, when the place of the channel is not his property.\*

#### ANNOTATIONS.

dcxxxiii. A *sharâk* (or partner in the substance of a property) is preferred to a *khalât* (or partner in its rights as of water or way†), and a *khalât* is preferred to a neighbour.—Fatawa Alamgiri, vol. v., page 477.—B. Dig., page 476.

\* Fatawa Alamgiri, vol. v., pp. 259, 260.—B. Dig., pp. 477, 478, 479, 480.

† Hidâyah, vol. iv., page 1, (413.)

So that if a mansion is sold in which one person has a way, and another a channel of water, the former has the right of pre-emption rather than the latter.\*

**Principle (dcxxxv.)** The neighbour whose connection with the property is closer than that of another neighbour has a preferable right (*k*).

(*k*) If a house be sold is situated in a short lane, shut up at one end, communicating through another lane, shut up also at one end, but of greater extent, in this case the inhabitants of the *short* lane only are entitled to the privilege of *shufá*; whereas if a house situated in the *long* lane be sold, the inhabitants of *both* lanes are so entitled. The reason of this is, that the right of egress and regress in the short lane is participated only by its own inhabitants, whereas the right in the *long* lane appertains equally to the inhabitants of both; as has been already explained under the head of "*Duties of the Kazi*." The same rule also holds good in the case of a small rivulet issuing out of another.—Hidáyah, vol. iii., page 566.

**Principle (dcxxxvi.)** But if the first *shafé*, or claimant by right of pre-emption, relinquish his right or claim, the second is entitled to enforce his own, and on his giving up his own right, the *shafé* in the third degree can exercise his own right (*l*).

(*l*.) If a partner in the property of the land relinquish his right of *shufá*, it devolves next to him who is a partner in the road; and if he also relinquish his right, it falls to the *Jár muldsik*, or person whose house is situated at the back of that which is the object of *shufá*, having the entry to it by another road.—Hidáyah, vol. iii., page 564.

When the owner of a large mansion in which there are several houses sells one of them, or sells any other known part of the mansion, the right of pre-emption belongs to the neighbour of the mansion on whichever side he may be. But if the pre-emptor gives up his right, and the purchaser afterwards sells the house, or the particular part, the right of pre-emption belongs only to the neighbour of the house or part which has now become a separate or independent property, and is no longer deemed to be a part of the mansion.\*

#### ANNOTATIONS.

dcxxxv., dcxxxvi. If the *sharik* gives up his right, the *khalít* is entitled; and among the *khalíts* the special is preferred to the general. If the *khalít* gives up his right, the neighbour is entitled. This is the answer of the *Zahir-ur-Rawayit* and it is correct.\*

\* *Fatawá Alamgírí*, vol. v., pp. 256, 257 & 259.—B. Dig., pp. 476—480.

(m.) Take the case of a mansion which is situate in a street without a

thoroughfare, and belongs to two persons, one of whom sells his share. The right of pre-emption

belongs, in the first place, to the other partner in the mansion. If he surrenders his right, it belongs to the inhabitants of the street equally, without any distinction between those who are contiguous and those who are not so; for they are all *khalîs* in the way. If they all surrender the right it belongs to a *mu'asik*, or contiguous neighbour. If there be another street leading from this street, and having no passage through it, and a house in it is sold, the right of pre-emption belongs to the inhabitants of this inner street, because they are more specially intermixed with it than the people of the other street. But if a house in the outer street be sold, the right of pre-emption belongs to the people of the inner as well as to those of the outer street, for the intermixture of both in the right of way is equal. If the street were open with a passage through, and a mansion in it were sold, there would be no right of pre-emption except for the adjoining neighbour. In like manner when there is a thoroughfare, which is not private property between two mansions (that is when they are situate on opposite sides of the way), and one of them is sold, there is no pre-emption, except for the adjoining neighbour. If the road be private property, it is the same as if it were no thoroughfare. A thoroughfare which does not give the right of pre-emption is a street that the people residing in it have no right to shut. In like manner as to a small channel from which several lands or several vineyards are watered, and some of the lands or some of the vineyards watered by it are sold: all the partners are pre-emptors without any distinction between those who are and those who are not adjoining. But if the channel be large, the right of pre-emption belongs to the adjoining neighbour. There is some difference of opinion as to the distinction between a small and a large channel. — *Fatâwâ Alamgîrî*, vol. v., page 259. — B. Dig., pages 476 & 477.

*Principle* (dxxxxvii) If one of the parties (having equal rights) relinquish his own right, it devolves on the others, and is participated equally among them (n). — *Vide Hidâyah*, vol. iii., page 567.

(n.) If one of them should cause his right to drop, the whole belongs, *per capita*, to those that remain. — B. Dig., p. 494.

*Principle* (dxxxxviii.) Several individuals claiming upon equal ground have equal claims without regard to the extent of their several properties or rights.

When there is a plurality of persons entitled to the privilege of *shufá*, the right of all is equal, and no regard is paid to the extent of their several properties. — *Hidáyah*, vol. iii., page 566.

Pre-emption according to 'us' is *per capita*, or by heads. When a man-

**Illustration:** sion is owned by three persons, one of whom has a half, another a third, and another a sixth, and the owner of the half having sold his share, it is claimed by the other two under their right of pre-emption, it is to be decreed between them in halves. Or if the owner of the sixth should sell his share, it is to be divided between the other two in halves \*

**Principle (dcxxxix.)** If any of the parties possessing the right of pre-emption happen to be absent, then the entire right of pre-emption can be claimed and exercised by those who are present : should the absentees afterwards appear and claim their shares they are entitled to the same (o).

(o.) If one is absent, decree is to be given, *per capita*, to those who are present. But if after decree of the whole to one who is present, a second should appear, half is to be decreed to him ; and if a third should appear, decree is to be given to him for a third of what is in the hands of each of the other two.\*

(o) If some of the partners happen to be absent, the whole of the *shufá* is to be decreed equally amongst those who are present ; for it is a matter of uncertainty whether those who are absent would be inclined to demand their right ; and the rights of those who are present must not be prejudiced on a mere uncertainty. If, however, the *Kazi* should have decreed the whole of the *shufá* to one who is present, and an absentee afterwards appear and claim his right, the *Kazi* must decree him the half ; and so likewise if a third appear, he must decree him one-third of the shares respectively held by the other two, in order that thus an equality may be established amongst them.—*Hidáyah*, vol. iii., page 567.

**Principle (dcxli.)** The right of pre-emption does not operate until the conclusion of the sale of the property, nor till after a regular demand has been made for it in the presence of witnesses.

#### ANNOTATIONS.

**dcxli.** The right of *shufá* is not established until demand has been regularly made in the presence of witnesses ; and it is requisite that it be made as soon as possible after the sale is known ; for the right of *shufá* is but a feeble right, as it

\* *Fatáwá Alamgiri*, vol. v, page 276.—B. Dig, page 494.

The privilege of *Shufá* is established after the sale, for it cannot take place until it be manifest that the proprietor is no longer inclined to keep his house, and this is manifested by the sale of it. It is therefore sufficient, in order to prove the sale and establish the privilege of *Shufá*, that the seller acknowledge the sale, although the person said to be the buyer deny it — *Hidáyah*, vol. iii., page 568.

**Principle (dcxli.)** Property claimed by right of pre-emption does not go to the claimant except by the surrender of the purchaser, or under a decree of a judge.

When the demand has been regularly made in the presence of witnesses, still the *Shafí* does not become proprietor of the house until the purchaser surrender it to him, or until the magistrate pass a decree, because the purchaser's property was complete, and cannot be transferred to the *Shafí* but by his own consent, or by a decree of a magistrate.—*Hidáyah*, vol. iii., pages 568 & 569.

Claims to *Shufá* or pre-emption are of three kinds. Of these the first is termed—" *Talab-i nawasabat*" (immediate claim), the second—" *Talab-i takrir wa ish-had*" (claim by affirmation and by invoking witness), the third—" *Talab-i tamlik* (claim for possession) or *Talab-i khasumat* (claim by litigation)."—*Vide Hidáyah*, vol. iii., pages 569, 571 & 572.—*Fatáwa Alamgiri*, vol. v., page 276.—*B. Dig.*, page 481.

By '*Talab-i mowasabat*,' or immediate demand, is meant that—

**Principle (dcxlii.)** The person possessing the right of pre-emption should assert his claim the moment he is apprized of the sale being concluded, or else his right is invalidated (*p*).—*Vide Hidáyah*, vol. iii., page 569.

(*p*.) And this it is necessary that he should do, insomuch that if he make any delay his right is thereby invalidated; for the right of *shufá* is but of a feeble nature as has been already observed; and the Prophet, moreover,

#### ANNOTATIONS.

is the dispossessing another of his property merely in order to prevent apprehended inconveniences. It is therefore requisite that the *Shafí* without delay discover his intentions by making the demand, which must be done in the presence of witnesses, otherwise it cannot be afterwards proved before the *Kazi*.—*Hidáyah*, vol. iii., page 568.

dcxlii. By '*Talab-i Mowasabat*' is meant that when a person who is entitled to pre-emption has heard of a sale, he ought to claim his right immediately on the instant (whether there is any one by him or not,\* ) and when he remains silent without claiming his right, it is lost.—*Fatáwa Alamgiri*, vol. v., p. 267.—*B. Dig.*, page 481.

\* *Enáyah*, vol iv, page 249.



has said "*The right of shufá is established in him who prefers his claim without delay.*"—Hidáyah, vol. iii., page 569.

*Principle* (dexliii.) It is not material in what words the claim is preferred ; it being sufficient that they imply a claim.—*Ibid*, page 570.

Thus if a person say—"I have claimed my *shufá*," or "I *shall* claim my *shufá*," or "I *do* claim my *shufá*," all these are good ;

*Illustration.*

for it is the meaning, and *not* the style or mode of ex-

pression, which is here considered. — *Ibid*.

There is some difference as to the words in which the demand should be expressed ; but the correct opinion is that it is lawful in any words that intelligibly express the demand. So that if he should say—"I have demanded," or "I take the mansion by pre-emption," or "do demand pre-emption" it would be lawful. But if he were to say to the purchaser "I am thy *Shafi*, or pre-emptor," it would be void.\*

*Principle* (dexliv.) If the *Talab-i-takrir wa ish-had*, or demand by affirmation with invoking witness, could not be made immediately after *Talab-i-mowasabat* (immediate demand), the former is to be made as soon after that as may be practicable (*q*).—*Vide* Hidáyah, vol. iii., page 571.

(*q*.) The second mode of claim to *shufá* is termed the '*Talab-i takrir wa ish-had*,' or claim by affirmation and taking to witness, and this also is requisite ; because evidence is wanted in order to establish proof before the magistrate ; and it is probable that the claimant cannot have witnesses to the *Talab-i mowasabat*, as that is expressed immediately on intimation being received of the sale. It is therefore necessary afterwards to make the *Talab-i ish-had wa takrir*, which is done by the *Shafi* taking some person to witness,—either against the seller, if the ground sold be still in his possession,—or against the purchaser,—or upon the spot regarding which the dispute has arisen ; and upon the *Shafi* thus taking some person to witness his right of *shufá* is fully established and confirmed. The reason of this is, that both the buyer and seller are opponents to the *Shafi* in regard to his claim of

#### ANNOTATIONS.

dexliii. It is necessary that the person claiming this right should declare his intention of becoming the purchaser immediately on hearing of the sale, and that he should, with the least practicable delay, make affirmation by witness of such his intention, either in the presence of the seller or of the purchaser, or on the premises.—*See* M. L., Chap. ii, Princ. 7.

\* *Fatawa Aliyahi*, vol. v., page 267.—B, Dig., pp. 481 & 482.

*shaf'd* ; the one being the possessor, and the other the proprietor of the ground ; and the taking evidence on the ground itself is also valid ; because it is *that* to which the right relates. If the seller have delivered over the ground to the buyer, the taking evidence against him is not sufficient, he being no longer an opponent ; for having neither the possession nor the property he is as a stranger. The manner of claim by affirmation and taking to witness is, the claimant saying—"Such a person has bought such a house, of which I am the *Shafi* ; I have already claimed my privilege of *shaf'd*, and now again claim it : be therefore witness thereof." (It is reported from Abu Yusuf that it is requisite the *name* of the thing sold, and its particular boundaries, be specified, because a claim is not valid unless the thing demanded be precisely known.)—Hidāyah, vol. iii., pages 571 & 572.

(q.) *Talab-i mowasabat*, or immediate demand, is first necessary ; then the *Talab-i ish-had*, or demand with invocation (of witness), if, at the time of making the former, there was no opportunity of invoking witnesses, as, for instance, when the pre-emptor, at the time of hearing of the sale, was absent from the seller, the purchaser and the premises. But if he heard it in the presence of any of these, and had called on witnesses to attest the immediate demand, it would suffice for both demands, and there would be no necessity for the other.—Fatawa Alamgiri, vol. v., page 268.—B. Dig., page 484.

*Principle* (dcxlv.) If upon the claimant's asserting his right and claiming the disputed property in the manner above-mentioned, the party then in possession thereof be he the seller or purchaser, be willing to deliver the property to the claimant, he is to take it upon the same terms as the purchaser was willing to purchase, or he has actually purchased, it (r). If the property was sold for a price payable at a distant period the claimant may either wait until that period is expired, and take the property for the same price ; or he may take it immediately on paying the price ; but he cannot claim any respite for payment, which had not been given to the purchaser (s).—*Vide* Hidāyah, vol. iii., pages 582 & 583.

(r.) If a man sell a house for a certain quantity of goods or effects, the *Shafi* is entitled to take it for the value of such effects ; for effects are amongst the things denominated *Zat-ul-kryim*, or things which being estimable are compensable by an equivalent in money. If, on the other hand, a man sell a house for a compensation in wheat, silver, or any other article esti-

mable by measure or weight the *Shaf* may take it for an equal quantity of the same article; because these are of the class of *Zat-ul-Imrat*, or things compensable by an equal quantity of the same species.—Hidayah, vol. iii., page 582.

If a man sell a piece of ground for another piece of ground, in this case as each piece of ground is the price for which the other is sold, the *Shaf* of each piece is entitled to take it for the value of the other, land being of the class of *Zat-ul-kayim*, or things compensable by an equivalent in money.—Hidayah, vol. iii., page 583.

(e.) If a house be sold for a price payable at a distant period the *Shaf* may either wait until that period be expired, and then take the house for the same price, or he may take it immediately on paying the price in ready money: but he is not entitled to take it immediately and demand a respite to the period settled by the purchaser.—Hidayah, vol. iii., page 583.

When a person purchases it must necessarily be for something that belongs to the class of similars, that is, things which are estimated by measure of capacity or weight, or approximates of sale; or something that belongs to the class of dissimilars, such as a piece of cloth, or a slave, or the like. In the former case, the pre-emptor takes the subject of sale at a similar of the price, in the latter, he takes it for its value according to the general body of the learned.—Fatawa Almagiri, vol. v., page 273.—B. Dig., page 488.

*Principle (dcxli.)*—If the seller should have received the price, the *Shaf* may take the house (i. e., property) for the amount set forth as the price by the purchaser (f).

(f.) And here the allegation of the seller is of no weight or credit for having received the price, the sale, as far as relates to him, is finally concluded, and he becomes only as a stranger; the dispute then lying betwixt the purchaser and the *Shaf*, regarding which we have already been very explicit in a former part of this section.—Hidayah, vol. iii., pages 580 & 581.

*Principle (dcxlvii.)* If the claimant be not apprised of the seller's having received the price, and the seller should allege a certain price received by him on sale of the property, then the claimant is entitled to have the property for the price mentioned (g).

If the *Shaf* be not apprised of the seller's having received the price, and

the seller should say—"I have sold the property for one thousand *dirams*, which I have received,"—in

this case the *Shaf* is entitled to take the property for one thousand *dirams*; for, as the beginning of the seller's speech, in which he acknowledges the sale, creates the *Shaf*'s right of *shufa*, the subsequent sentence, in which he

asserts his having received the price, as tending to extinguish that right which he has himself created, must not be admitted. But if the seller should say—"I have sold the ground and received the price," and then should add "which was one thousand *dirams*," his evidence with respect to the amount of the price cannot be admitted, because by the prior acknowledgment of his having received the price, he becomes like a stranger, and has no further concern or interest in the matter.—*Hidāyah*, vol. iii., page 581.

*Principle* (dcxlviii.) If the seller abate a part of the price to the purchaser, the *Shafi* (claimant by right of pre-emption) is entitled to the benefit of such abatement, but if the seller after the conclusion of the sale remit the whole of the price to the purchaser, the *Shafi* is not allowed to avail himself of such indulgence.

The reason of this distinction is, that an abatement of a part is an act connected with, and referring to, the original bargain or sale; and the *Shafi* is entitled to the benefit of it, because that sum which remains after deducting the abatement is the price; whereas an *entire remission* has no connexion with the original bargain. In the same manner also, if the seller abate a part of the price, after the *Shafi* has become seized of his *shufā* property, he [the *Shafi*] is entitled to the benefit of such abatement, and accordingly receives back the amount abated by the seller to the purchaser.—*Hidāyah*, vol. iii., pages 581 and 582.

*Principle* (dcxlix.) If, on the contrary, the purchaser, after the bargain is concluded, agree to an augmentation of the price in favor of the seller, the *Shafi* is not liable for such augmentation.

Because his privilege of *shufā* is established for the price originally settled; and if any subsequent augmentation were admitted to operate with respect to him, it would be a loss to him; whereas, on the contrary, any subsequent *abatement* is a *benefit*. Analogous to this case of *augmentation* is that formerly stated, in which it was remarked that if a man make a purchase for a certain price, and afterwards renew the purchase of the same thing, and settle a large price, the *Shafi* is not prejudiced by such augmentation, but is entitled to his *shufā* for the price first agreed upon.—*Hidāyah*, vol. iii., page 582.

*Principle* (dcl.) Should the seller or purchaser object to the claimant's right the latter can prefer his claim to the court

of justice,\* and sue the purchaser if the property has been taken possession of by him; otherwise the seller.†

If the Shafi bring the seller into court whilst the house is still in his possession, he (the Shafi) may commence his litigation against him, and the seller may retain the house in his own possession until he receive the price from the Shafi.—Hidāyah, vol. iii., page 575.

The third mode of claim to *shufa* is termed "*Talab-i khusumat*," or claim by litigation, which is performed by the Shafi petitioning the kazi or judge to command the purchaser to surrender up the land to him.—Hidāyah, vol. iii., page 572.

If the Shafi delay making claim by litigation, still his right does not drop according to Hanifah, such also is the generally received opinion and decrees pass accordingly.‡—There is likewise one opinion recorded from Abū Yūsuf to the same effect.—*Ibid.* p. 573.

The Fatawā Alamgiri includes *Talab-i khusumat* (demand by litigation) in the *Talab-i tamlik*, and says,—"By *Talab-i tamlik* or demand of possession is meant the bringing of the matter before the judge that he may decree the property to the claimant by virtue of his right of pre-emption."†

If he neglects to litigate the matter for a sufficient reason, such as sickness, imprisonment, or the like, and cannot appoint an agent, the right of pre-emption is not annulled. And though he should neglect to do so without a sufficient reason the right would not be annulled according to Abū Hanifah and Abū Yūsuf, also by one report. And this is the manifest doctrine of the sect, the fatwā being in accordance with it.‡ But according to Muhammad

\* The above preliminary conditions being fulfilled, the claimant of pre-emption is at liberty at any subsequent period to prefer his claim to a court of justice.—Maca. M. L., Chap. iv., Principle 8.

† If an agent on behalf of another purchase ground, the Shafi must sue the agent. If, however, the agent have delivered over the ground to his constituent, the Shafi must not institute his suit against the agent, (as he is neither the proprietor nor the possessor) but against his constituent; for the agent then stands as the seller, and his constituent as the purchaser; and when (as has been already explained) the seller delivers up the ground to the purchaser, the Shafi's suit is against the latter.—Hidāyah, vol. iii., page 572.

If the agent of a person who is absent sell ground on account of his constituent the Shafi may claim his right and obtain the ground from the agent, provided it is in his possession. The same rule also holds in the case of an executor authorized to sell land.—*Ibid.*

‡ Much difference of opinion prevails to this point. It seems equitable that there should be some limitation of time to bar a claim of this nature, otherwise a purchaser may be kept in a continual state of suspense. According to Abū Hanifah and another tradition of Abū Yūsuf there is no limitation as to time. This doctrine is maintained in the *Fatawā Alamgiri*, the *Muntahā-Bihar*, and in the *Hidāyah*, and it seems to be the most authentic and generally prevalent opinion. But the compilers of the *Fatawā Alamgiri* admit that decisions are given both ways.—Note by Sir William Macnaghten.

and Zufr and Abū Yusuf, also by another report if he should call witnesses to his demand, yet should neglect to sue for a month without a sufficient excuse the right of pre-emption is annulled, and decisions are also given according to this opinion.\*

*Principle (dcli).* The claimant is not obliged to deposit the price in the court on preferring his claim. It is sufficient that he pays it upon his taking possession† under the court's decree, but if he does not then make the payment, the purchaser (if already in possession) can retain the property until the price be paid.

It is not incumbent on the pre-emptor to produce the price at the time of making his claim. Nay, he may lawfully contest the matter without producing the price during the sitting of the judge. But after the decree has been pronounced he should then produce it. Though, if he should delay to deliver the price after he has been directed to deliver it, his right is not cancelled without any difference of opinion.‡

The *Shafi* may litigate his claim to *Shafi* although he do not produce in court the price of the ground in dispute.—*Hidayah*, vol. iii., page 575.

When, previous to the *Shafi* producing the price, the *kāzi* has commanded the purchaser to deliver up the ground (to the *Shafi*), still he may retain it in his own hand until the price be brought to him.—*Hidayah*, vol. iii., page 575.

If the *Shafi* delay to pay the price to the purchaser *after* the *Kāzi* has ordered him, still his privilege of *shuff* is not invalidated; for it has become firmly established by the litigation and the decree of the *Kāzi*.—*Ibid*.

*Principle (dcli).* When there are several persons who have together a right of pre-emption to a mansion, each of them before resignation or decree has a right in the whole; and that if one of them resigns his right before taking possession and before decree, the others may take the whole.\* But,—

\* *Fatawa Alamgiri*, vol. v., p. 268.—B. Dig., pp. 484, 488.

† Or when the Court may think proper.—*Vida Ghulam Nubby Chowdhry v. Gaur Kisor Rai*. *Sudder Dewanny Adawlut Reports*, vol. i., page 350.

‡ *Fatawa Alamgiri*, vol. v., pages 273, 275.—B. Dig., pages 488 & 494.

§ The *Shafi* purchaser has a right to retain the property until he has received the purchase-money from the claimant by pre-emption, and so also the seller in case where delivery may not have been made.—*Macn. M. L.*, Chap. iv., Princ. 9.

*Principle* (dcliii). After resignation, or after decree, the right of each one in that which has been resigned by or decreed to his fellow is made void. So that when there are two pre-emptors to a mansion, and the judge having decreed it between them, one of them surrenders his share, the other cannot take the whole.\*

*Principle* (dcliv.) When one pre-emptor is stronger than another, that is has a prior claim, and the judge passes a decree in his favor, the right of the weaker is made void. So that when there is a partner and a neighbour, and the former surrenders his right of pre-emption before a decree has been pronounced in his favor the neighbour may take up the right, but if the surrender does not take place till after the decree the neighbour's right is extinguished.\*

*Principle* (dclv.) When a pre-emptor who is absent has a better right than one who is present, and decree is given for the whole to the one who is present, after which the absent one appears, as, for instance, if the first were a *khalit* and the second only a neighbour, the judge is to cancel his decree in favor of the one who was present, and to decree for the whole in favor of him who was absent.\*

*Principle* (dclvi.) If the *kázi* decree in favor of the *Shafi* at the time when he has not yet seen the property in dispute, he [the *Shafi*] has an option of inspection, and if any defect be afterwards discovered in it he has an option from defect,† and may, if he please, reject it, notwithstanding the purchaser should have excepted such defect from the bargain, or, in other words, should have exempted the seller from responsibility for such defect.—*Hidáyah*, vol. iii., pages 576 & 577.

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#### ANNOTATIONS.

dclvi. When the judge has made a decree in favor of the pre-emptor, or the purchaser has made delivery, all the legal effects of sale are established between them, such as the options of inspection and defect.\*

\* *Fatawa Alamgiri*, vol. v., pp. 275 & 276.—*B. Dig.*, pp. 490 & 494.

† See *ante*, pp. 499 & 501.



Because, as the transfer of property by right of *shuf'a* is the same as a transfer of property by sale, the *Shafi* has, therefore, under both the above circumstances, the power of rejection in the same manner as any other purchaser; and this power in the *Shafi* is not destroyed by the purchaser having seen the property, or having so exempted the seller; for he [the purchaser] was not deputed by the *Shafi*, and his act, of course, does not affect the *Shafi*'s power of rejection.—*Hidāyah*, vol. iii., page 577.

*Principle* (delvii.) If the intermediate purchaser has made any improvements in the property, the claimant by right of pre-emption must either pay their value, or cause them to be removed.\* But if he has sown seed in the land, the pre-emptor must wait for the ripening of the crops, after which he will take the land at the full price.

If the purchaser of ground subject to a claim of *shuf'a* erect buildings or plant trees upon it, and the *kāfi* afterwards order the ground to be delivered to the *Shafi*, it in this case rests with him [the *Shafi*] either to take the ground, together with the building or trees, paying the value of both, or to oblige the purchaser to remove them. This is the doctrine of the *Zāhir-ur-Rawāyit*.—*Hidāyah*, vol. iii., page 586.

When a purchaser has erected buildings, or planted trees, or sown seed in land, and a pre-emptor then appears and a decree is given in his favor, the purchaser is obliged to take up the buildings and trees in making delivery of the land to him, except that when the doing so would be injurious to the land, the pre-emptor has an option, and may take the land at its price, with the buildings and trees at their value as taken up. This is according to the *Zāhir-ur-Rawāyit*; but with regard to seed all are agreed that the pre-emptor cannot oblige the purchaser to take it up, but must wait for the ripening of the crops, and that the land is then to be taken at the full price. Then when the land is left in the hands of the purchaser, it is left without hire or rent.—*Fatāwa Alamgiri*, vol. x., page 279.—*B. Dig.*, page 496. See *Ibid*, page 498.

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\* Where an intermediate purchaser has made any improvements in the property the claimant by pre-emption must either pay for their value, or cause them to be removed; and where the property may have been deteriorated by the act of the intermediate purchaser, he (the claimant) may insist on a proportional abatement of the price; but where the deterioration has taken place without the instrumentality of the intermediate purchaser, the claimant by pre-emption must either pay the whole price, or resign his claim altogether.—*Moon. M. L.*, Chap. IV., Princ. 10.



*Principle* (delviii.) In the case of the disputed property having been deteriorated by the purchaser, the claimant is entitled to proportional deduction in the price, but when the deterioration has not been caused by the purchaser, the claimant must either pay the whole price, or resign his claim.

If the purchaser wilfully break down the erections, the *Shayf* may either resign his claim, or may take the area of ground for a proportionable part of the original price; but he is not entitled to the ruins, because they are become a separate property, and are no longer appendages of the ground; and the right of *Shufá* extends only to the ground, and to things so attached to it as to be *appendages*.—*Hidáyah*, vol. iii., page 589.

If a man purchase a house or garden subject to a claim of *shufá*, and the building (owing to some unforeseen calamity) be destroyed, or the trees decay, it rests in the option of the *Shayf* either to resign the house or garden, or to take it and pay the full price; because, as buildings or trees are mere appendages of the ground (whence it is that they are included in the sale of land without any particular mention being made of them), no particular part of the price is set against them, unless where they have been wilfully destroyed by the purchaser, in which case it is lawful for him [the purchaser] to sell the appendages so destroyed, and make a profit by them, exclusive of the full price of the ground. 'It is otherwise when one-half of the ground is inundated; for in such case the half of the thing itself being destroyed, the *Shayf* may take the remainder, paying only half of the original price.—*Hidáyah*, vol. iii., page 589.\*

When a man has purchased a mansion, and has pulled down the buildings, or a stranger has done so, and a pre-emptor then comes to claim his right, the price is to be divided according to the value of the buildings as they were while standing, and the value of the cleared space, and the pre-emptor is to take the land at so much of the price as corresponds to the latter.\*

If the buildings are burnt down, or swept away by an inundation, so as to leave nothing in the hands of the purchaser, the pre-emptor must take the land at the full price.\*

*Principle* (delix). If the purchaser disposes of the purchased mansion before it is taken by the pre-emptor (u), the pre-emptor may take the premises and cancel all those acts of disposal by the purchaser.\*

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\* *Fatáwá Alamgiri*, vol. v., pp. 270, 280, 282.—*B. Dig.*, pp. 490 & 497.

(u). As, for instance, by gift or delivery, or by letting to hire, or converting it into a *majid*, or place of worship, and allowing people to worship in it, or into a cemetery or burying in it.\*

**Principle (dclx).** After obtaining possession of the property (the subject of pre-emption), if the pre-emptor has made any improvements in it by erecting buildings, planting trees, and so forth, and then if it be proved that the land belonged to a person other than the seller or the intermediate purchaser, in such case, the pre-emptor is entitled to recover his purchase-money from the party (be it the seller or the intermediate purchaser), from whom he had taken the property, and is at liberty to remove what was done by him upon the property or land in question, but he could not recover from either party the value of the improvements made by him.†

If a *Shafi* having obtained possession of his *shufi* land erect buildings or plant trees upon it, and it afterwards appear that the land was wrongfully sold being the property of another, the *Shafi* recovers the price from the seller where he had taken the land from him, or from the purchaser where he had taken it from him, because it is evident that it was wrongfully taken. He is not, however, entitled to recover from either party the value of his buildings or trees, but is at liberty to carry them whenever he pleases — *Hidayah*, vol. iii., page 588.

The right of pre-emption is rendered void in two different ways after it has been established. One of these is termed '*ikhtiyari*' (voluntary), and the other '*zari*' (necessary). The first is of two kinds—'*sarih*' (express), and '*daldatan*' (by implication) \*

**Principle (dclxi)** The right of the pre-emption is rendered void *expressly* when the pre-emptor relinquishes in plain terms (v), and it is rendered void *by implication* when anything is found on the part of the pre-emptor that indicates his acquiescence in the sale (u).—*vide* B. Dig., page 499.

\* *Fatawa Alamgiri*, vol. v., pp 279, 280, 282 — B. Dig., pp. 496 & 497.

† But a claimant by pre-emption having obtained possession of, and made improvements in, the property, is not entitled to compensation for such improvements, if it should afterwards appear that the property belonged to a third person. He will, in this case, recover the price from the seller, or from the intermediate purchaser (if possession had been given), and he is at liberty to remove his improvements — *Maon M L*, Chap iv., Princ 11.

(v) When the pre-emptor uses such expressions as these: "I have made void the *shufá*," or "I have caused it to drop," or "I have released you from it," or "I have surrendered it to you," whether the pre-emptor is or is not aware of the sale, provided, however, that it has actually taken place.\*

(w.) As, for instance, when knowing the purchase, he has omitted, without a sufficient excuse, to claim his right (either by failing to demand it on the instant, or by rising from the meeting, or taking to some other occupation, without doing so, according to the different reports of what is necessary on the occasion); or in like manner when he has made an offer for the house to the purchaser, or has asked him if he will give it up to him; or has taken it from him on hire, or in *musdrat* and all this with knowledge of the purchase.\*

(v.) If a man purchase a house and the *Shafí* relinquish his privilege, and the purchaser afterwards reject it in virtue of an option of inspection, or a condition of option,† or by a decree of the magistrate in virtue of an option from defect,‡ the *Shafí* is not entitled to claim his privilege whether the man had ever taken possession of the house or not; and so likewise if the man before taking possession reject the house on discovering a blemish without a decree of the *Kadí*; for, as, under all those circumstances, the rejection is a dissolution of the bargain, the house reverts to its original proprietor; and the privilege of *shufá* is not established but on the notification of a new sale.—*Hidáyah*, vol. iii., page 598.

(u.) If the *Shafí* omit to procure evidence of his having claimed his *shufá* on being informed of the sale, notwithstanding his ability so to do, his right of *shufá* is void, because of his neglecting to claim it. In the same manner also if he prefer the *Talab-i-mawásabat*, or immediate claim, and omit the *Talab-i Ish-had wa takrír*, notwithstanding his ability to make it, his right of *shufá* is void as has been already explained.—*Hidáyah*, vol. iii., page 59.

*Principle* (dclxii). The right of pre-emption is rendered void necessarily when the pre-emptor has died after the two demands,‡ and before taking the thing under the pre-emption

(x). But it is not made void by the death of the purchaser; and the pre-emptor may, accordingly, assert his right and take

\* *Fatáwá Alimghiri*, vol. v, pp. 282 & 283.—*B. Dig.*, p. 499.

† See ante pp. 488 & 500.

‡ "Or before demand" (*Durr-ul-Mukhtar*, page 794) and the same is implied in the reasons assigned in *Hidáyah* (see Translation, vol. iii., page 601). The question in the text may perhaps be accounted for by the title of the chapter, which has reference only to extinction of right after it has been established, and it is not established till demand.—Note † Mr. Haile.

the subject of sale from his heirs (*y*).—*Vide Fatawá Alamgírí*, vol. v., page 238.—B. Dig., page 500.

(*x*) If the *Shafi* die his right of *shufá* becomes extinct. *Shafi* maintains that the right of *shufá* is hereditary. The compiler of the *Hidáyah* remarks that this difference of opinion obtains only where the *Shafi* dies after the sale, but previous to the *kázi* decreeing him the *shufá*; for if he die after the *kázi* has decreed his *shufá* without having paid the price, or obtained possession of the property sold, his right devolves to his heirs, who become liable for the price. — *Hidáyah*, vol. iii., page 600.

(*y*) If the purchaser die, yet the right of *shufá* is not extinguished, for the *Shafi* who is entitled to it still exists, and no alteration has taken place in the reasons or grounds of his right. The house, therefore, is not to be sold for the payment of the purchaser's debts, or disposed of according to his testament; and if the *kázi* or executor sell it in order to discharge the debts of the estate, or if the purchaser have bequeathed it, the *Shafi* may render any of these transactions void and may take the house; for the right of the *Shafi* is antecedent, whence he has the power of annulling the purchaser's acts with respect to the property even during his life-time. *Hidáyah*, vol. iii., page 601.

*Principle* (dclxiii.) The right of pre-emption (*shufá*) is invalidated by the pre-emptor's compromising his privilege of *shufá* for a compensation; it is also invalidated by his selling the subject of his claim before the *kázi's* decree.

If the *Shafi* agree to compound his privilege of *shufá* for a compensation he thereby invalidates his right and is not entitled to the compensation; for he has no established *right or property* in the place in dispute, but merely a power of insisting on becoming the proprietor in exclusion of the purchaser; and as, therefore, a renunciation of *shufá* (understood in renouncing all right to disturb the proprietor in the enjoyment of the property) is not a subject of exchange, it follows that no consideration can be demanded for it.—*Hidáyah*, vol. iii., page 599.

If the *Shafi* previous to the decree of the *kázi* sell the house from which he derives his right of *shufá*, the reasons or grounds of his right being thereby extinguished, the right itself is invalidated, notwithstanding he be ignorant of the sale of the house to which it related; in the same manner as where a man relinquishes his *shufá* without being informed of the sale, or acquits a person of a debt without knowing the amount; in the first of which cases the right of *shufá* is invalidated, and in the second the debtor is acquitted. If

is otherwise where the *Shafi* sells his house upon a condition of option,\* for as, whilst a power of option remains in the seller his property is not totally extinguished, it follows that the ground of *shufâ* (namely, a conjunction of property) still continues.—*Hidâyah*, vol. iii., pages 601 & 602.

When the pre-emptor has compounded his right for an exchange, the right is made void and the exchange must be returned, for the right is not fixed (*mukarrar*) and inherent in a thing, but merely a naked right to take possession of it. It is therefore not a fit subject for exchange.\*

*Principle* (dclxiv.) When the pre-emptor has different rights of pre-emption, the extinction of one does affect the other.

When the pre-emptor is both a partner and a neighbour and sells his share on which his right in the former capacity was founded, he may still assert his claim on the ground of neighbourhood.\*

*Principle* (dclxv.) The right of pre-emption is however resumed when the claimant had relinquished it upon misinformation of the amount or the kind of price, or of the purchaser, or of the property sold.

If intelligence be brought to the *Shafi* of the house which is the subject of his right being sold for one thousand *dirams*, and he relinquish his right of *shufâ*, and afterwards learn that the house was sold for a less price, his resignation is not binding, and he may still assert his right of *shufâ*.—*Hidâyah*, vol. iii., page 602.

#### ANNOTATIONS.

dclxv. When the pre-emptor has surrendered his right on misinformation as to the amount or the kind of the price, or the person to whom the property has been sold, it is to be considered if his purpose would or would not have been changed had he been correctly informed; and if it would not the surrender is valid and the right extinguished; but if it would the surrender is not valid and the right may still be asserted. When the pre-emptor has been informed that the price was a thousand *dirams*, and has thereupon surrendered his right, but subsequently ascertains that it was a hundred *dinârs*, he retains his right if the value of the hundred *dinârs* be less than that of a thousand *dirams*; while if such is not the case the surrender is valid. When he has been told that the purchaser was such an one, and has thereupon surrendered his right, but, subsequently, ascertains that he was a different person, the right survives.—*Fatâwâ Alamgîrî*, vol. v., page 285, —B Dig., page 501.

If he surrenders on information that only half of a mansion has been sold, when in fact the sale has been of the whole, his right survives.—*Ibid*.

\* *Fatâwâ Alamgîrî*, vol. v., page 284—B. Dig., page 502.

If news be brought to the *Shafi* that one-half of the house is sold, and he resign his right, and it afterwards appear that the whole was sold, he must still in such case claim his *shufá*, since it is to be supposed that he at first resigned his right in order to avoid the inconvenience of a partner, whereas if the whole be sold there is no occasion for his being subject to any such inconvenience. If, on the contrary, the case be reversed, that is to say, if he first learn that the whole, and afterwards that only the half is sold, he is not (according to the *Záhir ur-Rawáyit*) entitled to claim his *shufá*, because his resignation of the whole comprehended his resignation of a part.—*Hidáyah*, vol. iii., page 604

If the *Shafi* be first informed that a particular person is the purchaser, and thereupon resign his *shufá*, and he afterwards learn that the purchaser was another person, he is still entitled to his *shufá*.—*Hidáyah*, vol. iii., page 603.

*Principle* (delxvi.) If the *Shafi* (or pre-emptor) act as agent of the seller, and sell the house on his behalf, his right of *shufá* is thereby invalidated : whereas if he act as agent for the purchaser, and purchase the house on his behalf, his right of *shufá* is not invalidated. In short, it is a rule, that if a person as agent for another, sell the land, &c., of that other, the right of *shufá* in both is thereby invalidated, whereas if an agent (such as a *manager* for instance) purchase land, or so forth, the right of both continues unaffected.—*Hidáyah*, vol. iii., page 602.

*Principle* (delxvii.) When a pre-emptor wishes to take one part of a purchased property without another, and the part is not distinct or separate (z), he cannot do so without any difference of opinion. He must, therefore, take or leave the whole, whether the purchase be by one person from one, or by one from two or more persons. So that he cannot take the share of one or two sellers, whether the purchaser had or had not taken possession according to *Záhir ur-Rawáyit* which is correct.\*

(z.) As, for instance, when the purchased property is a single mansion, the pre-emptor desires to take that part of it which abuts on his own premises without the remainder.\*

\* *Fatáwá Alamghí*, vol. v, page 272 —B Dig, page 492

*Principle* (dclxviii.) If a property be purchased by several persons, the claimant by right of pre-emption may take the whole or the portion of any one of them; but if the property be sold by several persons and purchased by a single person, then the claimant must either take the whole or relinquish the whole.

If five persons purchase a house from one man the *Shafi* may take the proportion of any one of them. If, on the contrary, one man purchase a house from five persons, the *Shafi* may either take or relinquish the whole, but is not entitled to take any particular share or proportion. The difference between these two cases is that if, in the latter instance, the *Shafi* were allowed to claim a part, it would occasion a discrimination in the bargain to the purchaser, and be productive of very great inconvenience to him; whereas, in the former instance, the *Shafi* being merely the substitute of one of the five purchasers no discrimination in the bargain is occasioned.—*Hidayah*, vol. iii., page 606.

*Principle* (dclxix.) When one man purchases from one by a single bargain, several *manzils* or houses in a street in which there is no thoroughfare; and the pre-emptor desires to take one of them. It has been said that if his right of pre-emption is based on partnership in the way, he cannot take a part of the purchased property, for this would be to divide the bargain without any necessity; but if the right be based on neighbourhood, and he is neighbour only to the house which he wishes to take, he may lawfully take it alone.—*Fatawá Alamgiri*, vol. v., page 272.—*B. Dig.*, page 492.

*Principle* (dclxx.) If part of the purchased property be separate and distinct from the other part of it, as for instance when two mansions are purchased by one bargain, the pre-emptor cannot take one of them without the other, if he is *Shafi* or pre-emptor of the two together. He must either take or leave both; and that according to 'our' three masters,

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ANNOTATIONS.

dclxviii. When, however, two persons purchase from one person, the pre-emptor may take the share of one of the purchasers according to them all, whether before or after possession.—*Fatawá Alamgiri*, vol. v., pp 282 & 283.—*B. Dig.*, pp. 282 & 283.

whether the mansions are adjacent to, or separated from, each other, and whether they are situate in one or two cities.\*

*Principle* (dclxxi.) If a father or guardian resign the right of *shufá*, such resignation is lawful according to Abú Yusuf and Hanifah.—Hidáyah, vol. iii., page 608.

The learned in the law observe there is the same difference of opinion in the case of a father or guardian omitting to make the claim of *Shufá* on being apprized of the sale of the house; or an agent resigning the claim before the tribunal of the *kázi*—*Ibid*.

*Principle* (dclxxii). When a person who has purchased a village (*kariah*) in which there are houses, and trees and palms, has sold the trees and buildings, and the purchaser from him has cut down some of the trees, and pulled down some of the buildings, after which the pre-emptor appears, he is entitled to the land and so much of the trees and buildings as have not been cut or pulled down, and to a deduction from the price corresponding to those that have been cut or pulled down, which he is not at liberty to take.†

There are devices by which the right of pre-emption may be easily as well as legally evaded. Thus,—

Where a man sells the whole of his house, excepting only the breadth of one yard extending along the house of the *Shafi*, he [the *Shafi*] is not in this case entitled to claim his privilege, because of his neighbourhood being thus out off. This is a device by which the *Shafi* may be disappointed of his right; and it is still the same if the seller grant the intervening part of his house as a free gift to the purchaser and put him in possession of it.—Hidáyah, vol. iii., page 604.

For other devices‡ see *Fatáwá Alamgírí*, vol. v., page 301.—B. Dig., pages 504—506.

\* *Fatáwá Alamgírí*, vol. v., pp. 272 & 273.—B. Dig., pp. 492 & 493.

† *Fatáwá Alamgírí*, vol. v., p. 282.—B. Dig., p. 498.

‡ There are many legal devices by which the right of pre-emption may be defeated. For instance, where a man fears that his neighbour may advance such a claim he can sell all his property, with the exception of that part immediately bordering on his neighbour's; and where he is apprehensive of the claim being advanced by a partner, he may, in the first instance, agree with the purchaser for some exorbitant nominal price, and afterwards commute that price for something of an inferior value; when if a claimant by pre-emption appear he must pay the price first stipulated, without reference to the subsequent commutation. Macn, M. L., Chap. iv., Princ. 13.



## CALCUTTA HIGH COURT.

THE 8TH OF JULY, 1870.

*Present :*

The Hon'ble Sir Richard Couch, *Kt*, *Chief Justice*, and the Hon'ble F. B. Kemp, L. S. Jackson, E. Jackson, and W. Markby, *Judges*.

CASES NOS. 1660 AND 1663 OF 1869.

*Special Appeals from a decision passed by the Judge of Bhagulpore, dated the 18th of March 1869, affirming a decision of the Moonsiff of Monghyr, dated the 24th of August, 1868.*

SHAH MAHOMED HOSSEIN (Plaintiff), *Appellant*,*versus*SHAH MOHSUN ALI (Defendant), *Respondent*.

CASE NO. 298 OF 1869.

*Application for review of judgment passed by the Hon'ble Justices J. P. Norman and E. Jackson on the 19th of July 1869, in Special Appeal No. 158 of 1869.*

CHUTERNATH JHA *alias* JHINGA JHA (Respondent), *Petitioner*,*versus*BHURJOO SINGH (Appellant), *Opposite Party*.

The right of pre-emption on the ground of vicinage does not extend to estates of large magnitude, but only to houses, gardens, and small parcels of land.

A partner, not in a house or small enclosure, but in a considerable estate, has a right, according to Mahomedan law, to pre-emption when one of his co-sharers in such estate sells his share to a stranger.

Cases Nos. 1660 and 1663 were referred to the Full Bench by Loch and Hobhouse, JJ., with the following remarks :—

*Hobhouse, J.*—These cases had best, we think, be referred to the Full Bench. The question is when the claim for pre-emption is founded on vicinage, will that claim extend to any property of the description of a share in a village?

Understanding that a cognate case has been referred to the Full Bench by Mr. Justice Norman and Mr. Justice E. Jackson, let these cases be also referred to the same Full Bench.

*Loch, J.*—I concur.

Case No. 298 was referred to the Full Bench by Norman and E. Jackson, JJ., with the following remarks :—

*Airman, J.*—We refer this case to a Full Bench for the consideration of the following points :—

By several recent decisions of this Court, it has been established that under Mahomedan law, the right of pre-emption possessed by a neighbour extends only to houses and small parcels of land, and not to considerable estates.

In two recent cases, 11 W. R., p. 71, and 10 W. R., p. 314, it has been held that the right of a shareholder to pre-emption exists, whether the parcel of land sold and in respect of which the claim is made be large or small.

There are many prior decisions to the same effect. But we doubt whether it can be shown that, under the Mahomedan law, there is any ground for that distinction; whether under that law there is any case in which a partner has a right of pre-emption in which, if he fails to exercise it, a neighbour may not also claim to exercise such right.

The question is whether, according to Mahomedan law, a partner not in a house or small enclosuro, but in a considerable estate consisting of a mouzah with five *puttees*, has a right to pre-emption, when one of his co-sharers in such estate sells his share to a stranger.

The judgment of the Full Bench was delivered as follows by—

*Couch, C. J.*—The question referred to the Full Bench in Special Appeals No. 1660 and No. 1663 of 1869 is as follows:—“When the claim for pre-emption is founded on vicinage, will that claim extend to any property of the description of a share in a village?”

It appears that there are a great many decisions of the courts of this country in which an opinion has been expressed, that when the claim for pre-emption is founded on vicinage, the right is limited to property of small extent.

In 1856, the Judges of the Agra Sudder Court, when considering the right of pre-emption on the ground of vicinage, said (page 396) — “There can be no doubt that in the Mahomedan law, lands are included amongst the articles concerning which *shufâ* or pre-emption operates; but it may admit of question whether entire mehals or estates were intended, or merely parcels of lands, gardens and the like. The latter view appears to be supported by a passage in the *Hidâyah* which quotes a saying of the Prophet to the effect that *shufâ* affects only houses and gardens.” This case was referred to by a Full Bench of this court in 1863 (*Sutherland's Special Number*, page 143) where the Judges say that they would not on the mere ground of vicinage support a claim of pre-emption in respect of an entire estate.

In 2 W. R., p. 261, we find the court says:—“Plaintiff claims on the ground of vicinage alone. Now it is clear that, if the Mahomedan law does not bear out his claim, there is no other custom which does; and we are

of opinion that, even supposing the Mahomedan law in all its integrity to apply to the case, the plaintiff's claim cannot be supported. A claim founded on joint tenancy is, no doubt, good; but as regards vicinage not accompanied by joint tenancy the law is unfavorable and construes strictly such claims. The authorities are even at variance as to their admissibility; but assuming it to be settled that some claims on mere vicinage are good, the principle seems to be that, when either houses or small holdings of land make parties, in fact, such near neighbours as to give a claim on the ground of convenience and mutual servience, the claim in right of pre-emption will lie; but this principle does not apply to large estates which are not, in fact, such that any real vicinage of the proprietors results."

This decision is approved of and adopted in 8 W. R., p. 310, and again in the same volume at page 413. In a case reported at page 356 of the 10th Volume of the W. R., Mr. Justice Loch says:—"Looking at the Chapter on *shufá* in the *Hidáyah*, the right appears to be limited to parcels of land, houses, &c., and does not contemplate the right to purchase a separate estate, because a part of it is contiguous with that of the *Shafi*. It is true that a person may have a bad neighbour as a zemindar, and so suffer as much vexation from him as from a bad neighbour next door or holding the next field; but still it appears to me that the law was intended to prevent vexation to holders of small plots of land, who might be annoyed by the introduction of a stranger among them." I think I would apply the ruling laid down in the judgment of the court quoted above to the present case, and allow the judgment of the Lower Court to stand; for the property to which the right of pre-emption is claimed, is a separate estate paying revenue to Government.

Mr. Justice Mitter says:—"The property in dispute is an estate paying revenue to Government, and I am not prepared to say that this case is not governed by the decision relied upon by the respondent."

These cases are all referred to, and concurred in, in a case reported in 11 W. R., p. 251.

The Arabic word used to describe the subject-matter of pre-emption is '*akdr*'. There has been a considerable discussion during the argument of this case upon what is the true meaning of that word. The Counsel for the appellant has contended that it applies to estates of all descriptions and magnitude; that there is under the Mahomedan law no limit whatever; that the right exists whether the estate sold be large or small, provided that any portion of it is contiguous to the estate of the party claiming the pre-emption, and that the decisions of this court which put a limit on the right in this respect are wrong.

We are, however, not prepared to say that there is not some ground for the limit which this court has, in the above cases, put upon the right ever on the words of the text of the law itself. It is probably impossible now to discover the precise meaning which was put upon the word *akār* at the time when the Arabic texts were composed. Looking not merely at the words used in the *Hidāyah*, but at the illustrations given in the second and third chapters of the same book, at the state of society when the law was first uttered, and at the inconveniences against which it was probably directed, the better opinion might be that *akār* should be construed to mean houses and small enclosures of land. But we rely rather on the uniform series of decisions, which very clearly recognize that the right of pre-emption on the ground of vicinago does not extend to estates of large magnitude, but only to houses, gardens, and small parcels of land. We do not consider that there is any thing before us which would justify us in disturbing that long series of decisions.

In Review No. 298 of 1869, on Special Appeal No. 158 of 1869, the question is referred to us in the following terms:—"By several recent decisions of this court, it has been established that under the Mahomedan law the right of pre-emption possessed by a neighbour extends only to houses and small parcels of land, and not to considerable estates. In two recent cases (11 W. R., p. 71, and 10 W. R., p. 314) it has been held that the right of a shareholder to pre-emption exists whether the parcel of land sold and in respect of which the claim is made be large or small. There are many prior decisions to the same effect. But we doubt whether it can be shown that under the Mahomedan law there is any ground for that distinction; whether under that law, there is any case in which a partner has a right of pre-emption in which, if he fails to exercise it, a neighbour may not also claim to exercise such right."

The question is, whether, according to Mahomedan law, a partner not in a house or small enclosure, but in a considerable estate consisting of a mouzah with five *puttees*, has a right to pre-emption when one of his co-sharers in such estate sells his share to a stranger.

In the case referred to in 10 W. R., p. 314, the question does not (according to the report) appear to have been raised; but in the other case (11 W. R., p. 71) the question was raised, and the Judges (Kemp and Glover, JJ.) say that they find nothing in the Mahomedan law which restricts the right of pre-emption of a coparcener to small parcels of land.

We find that this decision is in accordance with the law as recognized from a very early period. In a case which occurred as early as the year 1811 (reported in I. Select Reports, page 350) the right of pre-emption was claimed

ed and established by a shareholder in respect of a share in an entire per-gunnah. In another case which occurred two years after (reported in Volume II., Select Reports, page 85) the right was applied to a whole mouzah.

Again, in 1840 (VI. Select Reports, page 277) we find it applied to a whole village, which, from the price, was evidently a considerable one. In 1857 (Sudder Decisions, page 454) it was applied to a talook; and again in 1858 (Sudder Decisions, page 1754) to a village.

It is true that in none of these cases was any question raised as to the extent of the right; but the absolute silence of the reports upon any such limit is now contended for, notwithstanding the numberless instances in which the right of pre-emption must have been claimed by a partner in respect of a share in a large estate, strongly shows that for a very long period no such limitation has been supposed to exist.

It was urged upon us that the two lines of decision as to a neighbour and a partner could not be reconciled; that the right was given by the Arabic texts to both in the same terms; and that if the right was limited in the one case it ought also to be so in the other, the only respect in which the three classes of claimants differ being the right of priority. Now, if we are to look exclusively at the language of the law as it appears in the Hidayah there is certainly ground for this contention. But we think that we should not be justified, merely for the sake of logical consistency, in overruling what appears to have been the law consistently applied in this Court for a great number of years, and never until very recently questioned.

This view of the Mahomedan law of pre-emption in the case of partners has, no doubt, been acted upon in a great number of cases and is in conformity with modern usage; and to disturb it now would be to disturb a great many titles. Moreover, the distinction between the case of a neighbour and the case of a partner does undoubtedly proceed upon a very sound principle, viz., that the right should be co-extensive with the inconvenience which it is intended to avoid.

The result is that we answer the question in Special Appeals Nos. 1663 and 1660 of 1869 in the negative, and the question in Review No. 208 of 1869, in Special Appeal No. 158 of 1869 in the affirmative.—Weekly Reporter, Vol. XIV., Full Bench Rulings, page 1.

## CALCUTTA HIGH COURT.

*The 13th May and 3rd June, 1878.*

FULL BENCH.

PRESENT :

The Hon'ble Sir R. Garth, Kt, Chief Justice, and the Hon'ble L. S. Jackson, C. J. E.,  
W. Markby, W. Ainslie, and R. C. Mitter, Justices.

LALA NOWBAT LAL (Plaintiff) *Appellant*,

vs.

LALA ROWSHUN LAL and others (Defendants) *Respondents*.*Pre-emption—Co-parcener.*

By the Mahomedan Law, one co parcener has no right of pre-emption as against another co parcener.

This was a reference by Mr. Justice Mitter to a Full Bench of the Court, and the order of reference, which fully explains the point in the case, was as follows:—

In this case two objections have been taken to the judgment of the Lower Appellate Court:—Firstly, that the District Judge has not tried the question whether the defendant, Jewan Lal, is a co-sharer in the putti of which the share in suit is a component part; and secondly, that admitting that Jewan Lal is a co-sharer, the plaintiff is entitled to a partial decree.

The first objection does not appear to me to be tenable. It is admitted that the plaintiff has adduced no evidence upon that point. While on the other hand, the defendant has adduced evidence to establish that he is a co-sharer in the putti in question. Under these circumstances the Courts below were right in treating the defendant as a co-sharer in the putti of which the disputed share is a part. I am of opinion, therefore, that I ought not to yield to this objection.

As regards the next objection, it appears to me that the case cited by the Munsiff is in conflict with that of *Moheshur Lal vs. G. Christian*, reported in the 6th, W. R., p. 250.

There being this conflict in the decisions of this Court, I think it right to refer the case to a Full Bench. The question referred is whether, under the Mahomedan law, one co parcener has a right of pre-emption against another co-parcener?

The judgment of the Court was delivered by

GARTH, C. J.—We are of opinion that by the Mahomedan law one co-parcener has no right of pre-emption as against another co-parcener.

There appears to be no reason, either upon principle or authority, why the right of *shuffa* should exist as between co-parceners; and the rule as laid down in Hamilton's *Hedāyah*, Vol. III., Book 38, Chapter I, appears to have been misunderstood in this respect. That rule merely prescribes that any one partner (or co-parcener) of a property has a right of *shuffa* as against a stranger who purchases a share from his co-partner, and does not mean that the right exists between co-partners who may purchase shares from one another.

The object of the rule, as explained in that chapter, and in Chapter III., is to prevent the inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a co-parcener or near neighbour. But it is obvious, that no such annoyance can result from a sale by one co-parcener to another. The only result of such a sale would be to give the purchaser a larger share in the joint property than he had before, and perhaps larger than the other co-parceners have.

The only authorities in this Court to which our attention has been called, are entirely in favour of this view, (see *Mohesher Lal vs. Christian*, 6, W. R., 250; and *Teeka Dhum Singh vs. Mohur Singh and others*, 7, W. R., page 260). The case of *Koshan Mahomed and others vs. Mahomed Kuboer and others*, 7, W. R., page 150, decided by Justices Kemp and Markby appears, when the facts of it are properly understood, to have no application at all to the question before us. We find from the record of that case that the true state of facts was this. One out of 3 co-parceners had sold his share to a stranger. One of the other co-parceners had exercised the right of *shuffa* against the stranger, and obtained the sale of the share to himself; and the only question in the case was, whether the remaining co-parcener had a right to participate in the purchase with the co-parcener who had thus obtained it.

We therefore decide the question referred to us in the negative, and dismiss the special appeal with costs.

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DIGEST OF RULINGS ON PRE-EMPTION.

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*The following is taken from Sloan's Edition of Macnaghten's Principles and Precedents of Mahomedan Law, 4th Edition, Madras, 1870, vide pp. 489 to 502.*

1. By the Mahomedan law the right of pre-emption appertains to one partner over the share of another partner, as their property is joint and undivided, and he is a sharer in the thing itself. 15th Sept. 1813. 2 S. D. A. Ben. Rep. 85.
2. On a claim of Shufaah, or right of pre-emption, founded on viri-nage and partnership, it being proved that the plaintiff had made the requisite demand and protest on hearing of the sale, though payment was not immediately tendered, judgment was given in favor of the plaintiff, in conformity with the opinion of the Mahomedan law officers, on condition of payment by a certain day. 22nd October 1811. 1 S. D. A. Ben. Rep. 350.
3. A sells lands to B, conceiving himself entitled to do so as heir of his father, the former Mukarraridar; and C (late Malik) claims a right of pre-emption, declaring at the same time, that the estate of a Mukarraridar upon his death devolves on his heir, as, by the settlement concluded between the Government and the Mukarraridar, he becomes Malik of the proceeds of his Mukarrari, with the exception of a portion thereof, which the late Malik receives as Malikanah; consequently the right of the late Malik is not wholly transferred to the Mukarraridar but he and the late Malik are to each other in the relation of partners, and the right of Shufaah appertains to one partner over the share of another, because such property is joint and undivided, and he is a sharer in the thing itself. C therefore, as late Malik, was decreed to have a claim to pre-emption. 15th September 1813. 2 S. D. A. Ben. Rep. 85.
4. It was held, that if A, a Mahomedan trader, transfer lands to B by sale, and C afterwards come forward and establish his right of Shufaah, he will be entitled to the lands at the price paid for them by B, who will be compelled to refund the profit accrued during the period of his possession to C, receiving himself the purchase money from A. Ib.



5. In a suit by a Mahomedan to establish his superior right of pre-emption of a house bought by another person, it was held by the Register's and Judge's Courts, that the sale was void, on the ground of informality of the deed of sale (it not having been submitted to the Kazi,) and leaving the right of pre-emption to be determined by a fresh action or the highest offer : but these decisions were reversed on appeal ; and the Court held that the deed of sale was a valid instrument, and the respondent had failed to establish his right of pre-emption, having forfeited the same, under the provisions of the Mahomedan law, by declining to purchase the house in dispute previously to its acquisition by the Appellant. 31st May 1823. 2 Borr. 366, Bom. S. A.
6. In a suit by A to set aside a sale by B of a piece of land containing a burying ground, it was not proved by B that A had given up a right of pre-emption possessed by him ; and as the Mahomedan law did not allow of the sale of burying grounds, the sale was annulled, liberty being given to B to make a fresh sale, excluding the burying ground, and giving such notice to A as his right of pre-emption entitled him to by law. 9th March 1824. 2 Borr. 682, Bom. S. A.
7. A respondent having been declared entitled to redeem from mortgage one moiety of a village as the portion to which he was entitled by the law of inheritance, as an heir of the original mortgagor, was informed by the Court that he was entitled to recover, by right of Shufaa, the other moiety which had been sold by his co-heir. 14th March 1825. 4 S. D. A. Ben. Rep. 32.
8. A claim in right of pre-emption to property, the possession of which has been transferred by a deed of *Hibeh bil-iwaz*, or gift for consideration (such consideration being expressly stipulated), is good under the Mahomedan law. 29th July 1835. 6 S. D. A. Ben. Rep. 34.
9. And this, notwithstanding that the consideration stipulated in the deed of gift be considerably below the real value of the property. Ib.
10. Where a Mahomedan might have had cognizance of the sale of a piece of ground, to the pre-emption of which he was entitled, and did not prefer his claim till a considerable time after the sale, his right of pre-emption was held to be forfeited, as he should have filed a suit within one month against the vendor. 7th Feb. 1830. Sel. Rep. 178, Bom. S. A.

11. Under the Mahomedan law pre-emption cannot be claimed in a case of *Bay taljiah*, or fictitious sale made to serve a temporary purpose. 10th Dec. 1840. 6 S. D. A. Ben. Rep 306.
12. In a case of *Bay taljiah*, a lease of the property from the alleged purchaser to the seller does not render the sale absolute, so that pre-emption can be claimed. Ib.
13. Pre-emption if not claimed immediately is barred. Ib.
14. But pre-emption cannot be claimed where the consideration is not expressly stipulated. Ib.
15. A party having claimed the right of pre-emption in certain lands, and obtained a decree, is not at liberty to withdraw from his claim in consequence of the resumption of the lands by Government, and the conclusion of a settlement with other parties. 4th May 1841. S. D. A. Sum. Cases, 9.
16. The right of pre-emption, decreed on condition of the payment of the purchase money within one month, was held to be lost on failure of the payment within the time prescribed. 26th Dec. 1840. 1 S. D. A. Ben. Sum. Cases Pt. 1, 51.
17. A purchaser of a portion of an estate is not barred from a right of pre-emption of another portion, on the ground that he himself had purchased only three years before the institution of his suit. 7th May 1846. S. D. A. Dec. Ben. 176.
18. The resumption of lands by Government, and a settlement made with a purchaser of a portion of an estate, does not bar the right of pre-emption in the possession of another portion. Ib.
19. A sale or mortgage of an estate to a third party, by one of the co-sharers in such estate, being an infraction of the *Wajib-ul-arz* in the Collector's office, by which the Vendor and sharers bound themselves not to sell the estate to a stranger without first endeavouring to obtain a purchaser among their co-sharers, is insufficient to give one of the sharers a right of pre-emption if he have forfeited that right by refusal to purchase at a fair valuation. 11th August 1847. 2 Dec. S. D. A. N. W. P. 249.
20. The parties to a sale may cancel the contract between themselves, but their annulment of a sale which has been completed cannot set aside the right of a third party to pre-emption. 8th February 1848. 3 Dec. S. D. A. N. W. P. 47.
21. The Malik of a resumed rent-free tenure, which has been settled with the Maafidar, has not the right of pre-emption, on sale of

the property by the latter. 30th December 1848. 7 S. D. A. Ben. Rep. 561. 9th August 1849. S. D. A. Dec. Ben. 344.

22. A party having been *Malik* of certain land, formerly an *altamgha* grant, and afterwards constituted a *Mahall*, or estate permanently settled with those who were the rent-free holders of the said grant, has no right of pre-emption; the permanent settlement of the land, as a separate estate, completely separating the property from the *Malik*, who in futurity had no further concern in the land, in lieu of which he was entitled to receive a money allowance from the Government Treasury. 9th Aug. 1849. S. D. A. Rep. Dec. Ben. 344. \*
23. When the Sudder Board in a certain letter, had declared that where a *Bulwarra* of the estate had been properly carried out under the law, a claim of pre-emption would not lie; it was held, that such letter was no authority for setting aside the Mahomedan law in a suit brought to set aside the sale of the estate under the provisions of that law, with regard to the right of pre-emption. 3rd May 1849. 4 Dec. S. D. A. N. W. P. 103.
24. A right of pre-emption cannot be claimed previous to actual sale. 22nd April 1848. 7 S. D. A. Ben. Rep. 487. 23rd July 1850. 5 Dec. S. D. A. N. W. P. 189.
25. A party whose house is in the same compound, or inclosure as the one sold, (both having a common entrance through the inclosure) has a superior right of pre-emption to another party whose house adjoins the one sold, but is separated from it by a wall. 26th Dec. 1850. S. D. A. Dec. Ben. 602. 4 Hed. 562, 564.
26. By the Mahomedan law a claimant for the right of pre-emption, is bound to bring forward his claim immediately on hearing of the sale, and the notice of a year issued previously to a conditional sale becoming absolute, was held to be sufficient notification to all parties concerned, and to preclude a party from claiming a right of pre-emption unless immediately after such sale had become absolute. 25th Jan. 1847, S. D. A. Dec. Ben. 22.
27. A claim for the right of pre-emption under the Mahomedan law, was disallowed on failure of proof that the *Talab-i-Muwassabat* or immediate demand, had been made by the claimant. 19th July 1847. S. D. A. Dec. Ben. 267.
28. A claim to the right of pre-emption was dismissed, the "immediate demand" required by the Mahomedan law not being prov-

ed. 17th June 1848. S. D. A. Dec. Ben. 533. 22nd July 1848. S. D. A. Dec. Ben. 709.

29. It is sufficient that the right of pre-emption has been demanded before witnesses from one of several sellers, and the presence of all the sellers is not necessary to render the assertion of such right legal and formal. 17th June 1848. 7 S. D. A. Rep. Ben. 424.
  30. A party claiming on a right of pre-emption must, according to the Mahomedan law, prefer his claim founded on that right, *immediately* on knowledge of the sale *however acquired*. 4th April 1850. S. D. A. Dec. Ben. 99.
  31. The *immediate claim* to a right of pre-emption is not restricted to any particular form of words; and it was held sufficient to establish such claim where the claimant, immediately on hearing of the sale, cried out *Kharid kiya* three times. 27th June 1850. S. D. A. Ben. Dec 321.
  32. Where a claimant to a right of pre-emption, immediately on hearing of the sale, sent several persons with the money to be tendered to the vendor and purchaser, and to demand the delivery of the deed of sale, it was held, that all but the actual agent so sent to make the tender were witnesses in the legal sense of the word; i. e., persons sent to see the tender made, and who did see the tender made, and deposed to having seen it. *Ib.*
  33. If the immediate demand and tender of price be made to one of several joint sellers, or purchasers, it is good in law. 23rd Dec. 1850. S. D. A. Dec. Ben. 535.
- NOTE.—When the right of pre-emption exists among Hindus, it is subject to the rules and regulations of the Mahomedan law. 7 S. D. A. Rep. 129. Morley. *Vide* Case 39.
34. A party having claimed the right of pre-emption in certain lands, and obtained a decree, is not at liberty to withdraw from his claim, in consequence of the resumption of the lands by Government, and the conclusion of a settlement with other parties. 4th May 1841. S. D. A. Ben. Sum. Cases, 9.
  35. In a suit for pre-emption the decree should record the points, proved in evidence, to enable the appellate Court to judge whether the law has been properly applied. 6th February 1847. S. D. A. Dec. Ben. 44.

NOTE.—The parties in this case were Hindus, but as the Mahomedan law of pre-emp-

tion is applicable where they are concerned (vide Note to Case 33 and Case 39), the rule is general

36. Where, in a suit for pre-emption, the lower Courts' decrees set forth that the requisitions, preliminary to a claim by pre-emption had been complied with, but did not state what those requisitions were, and what in the judgment of the zillah judicial authorities, the law required in that respect, the case was remanded. 13th January 1848. S. D. A. Dec. Ben 12.
37. Evidence to the preliminaries to the protest and demand, as laid down in page 183 of *Macnaghten's Mahomedan Law*, is essential to the proof of the pre-emptive claim (vide page 182), and application to a third party, which the plaintiffs, it appears, adduced as a further proof of their desire to purchase, cannot be regarded as making up for any defects in the original conditions. 16th June 1851. Dec. S. D. A. N. W. P. VI. 214.
38. The lower Courts having, in a claim for the right of pre-emption, decided that both parties possessed the right, and having accordingly decreed partly in favor of plaintiffs, allowing the defendants to retain a portion of the land purchased, the *Sudder Dewanny Adawlut* ruled, in special appeal, that there can be no such thing as a *divided* right of pre-emption; and that the entire and unutilized title must vest in one party or the other. It was further ruled that the plaintiffs had by their own laches, forfeited for the time whatever claim by right of pre-emption, they may have once possessed; but that they still had the right to purchase in preference to an entire stranger, should the property again come into the market. 23rd June 1851. Dec. S. D. A. N. W. P. VI. 231.

NOTE.—This case was between Hindoos.

39. In this case the defendant (a Hindu) met the claim by denying that the pre-emption-right (to establish which a Mussulman had instituted the suit), was recognized by Hindoo law. This plea was overruled by the *Sudder Dewanny Adawlut*, on the Judges observing that, "on the first point, the Judge (of the lower Court) has declared the right of pre-emption to exist under the Hindu law as expounded by Sir W. Macnaghten, the Court however do not find this to be borne out by the Principles and Precedents published by that gentleman. In page 15 of the preface to the *Mahomedan Law*, it is, on the contrary, stated

that the more current authorities of Hindu law are entirely silent on the subject, and after a quotation from a doubtful authority, the passage concludes by observing that it remains yet to be decided, whether it should be held to be practical law or not. Subsequent decisions have, however, shown that the right of pre-emption among Hindus, is recognized by the Courts, when founded on prescriptive usage and local custom, but it has also been ruled (Calcutta Court, 25th July 1813), that as the right is derived originally from the Mahomedan law, the rules and restrictions of which are considered even by the Hindus themselves, as applicable to the practice existing among them, the preliminary requisites necessary to sustain a claim of pre-emption, viz., the declaration of an intention, to become a purchaser immediately on hearing of the sale, followed by affirmation of the witnesses of such intention, either in the presence of the seller or the purchaser, or on the premises, must be observed. 7th June 1852. Dec. S. D. A. N. W. P. VII 227.

40. A moonsiff having dismissed a suit to establish the right of pre-emption in consequence of the plaintiffs not having observed the requirements of the Mahomedan law, the Judge decided that the plaintiffs had done their best to comply with the requisition of the law. The Sudder Dewanny Adawlut however ruled, that such was not sufficient; and that the Court must find that the claimants had done what the law requires, or no decree can be passed in their favor. 8th Dec. 1853. Dec. S. D. A. N. W. P. VIII. 769.
41. In a suit instituted by a Mussulmann against a Hindu to establish the right of pre-emption, to property sold by auction in execution of a decree, held, that, the pre-emption-right supposes an act of volition on the part of the vendor, a principle inapplicable to a transaction of compulsory sale made by any authoritative order, or injunction; and that the incident of a public sale creates a new element beyond the ordinary scope of such right. Claim disallowed. 24th Jan. 1854. Dec. S. D. A. N. W. P. IX. 41.
42. A son, during the life-time of his father (who is a coparcener in the village), has not under the Mahomedan law, any right of pre-emption, by virtue of hereditary property to which he has not succeeded. 20th March 1854. Dec. S. D. A. N. W. P. IX. 129.

43. A special appeal being admitted in a suit regarding pre-emption to determine, whether one month only is allowed for the institution of a suit or claim with reference to pp. 48, 187 and 188, Macnaghten's Mahomedan Law, and Note, held, that, "the exact period for preferring the claim by litigation is not clearly laid down by the Mahomedan law, wherein some authorities have declared that such claim must be made within one month, while others have ruled there is no limitation. This latter doctrine appears to be the most authentic and generally prevalent opinion. But, before deciding that point, we have to consider whether the limit allowed for the institution of a suit by the regulations, can be restricted by the operation of the Mahomedan law. The question was raised and decided by a full bench of Judges on the 20th March 1845, in the case of Rajah Birj Nath Singh, special petitioner, wherein it was ruled, with reference to the authority cited, that a positive enactment, such as that of Sec. 14, Reg. III. of 1793, supersedes the tenets of Mahomedan law as also of Hindoo law; and a claim for possession after the lapse of twelve years, in a suit between Hindoos, to which class the Court held the law was equally applicable, was dismissed. In the case quoted it was sought to set aside the law of limitation, under the plea that adoption, after the lapse of any number of years, was valid under the Hindoo law. The plea, however, was, for the reasons set forth, considered invalid, and the decision was passed on the grounds of the regulation law of limitation. Adopting and applying the principle of the above decision to the case before us, we are of opinion that even if it were a settled point, that, in cases of shoofa, the claim by litigation, under the Mahomedan law, should be preferred within one month, we hold that the law of limitation, as laid down in Sec 14, Reg. III. of 1793, cannot be superseded by such restriction. 1st May 1851. Dec. S. D. A. Ben. 292

Note.—Vide Sec. 1, Act XIV. of 1859.

44. Where a prescriptive usage is proved or acknowledged to exist in any locality, such usage of itself is law, binding on all classes to whom the usage has been prescriptively held applicable. It is unimportant whether the usage has given local force to rules of Mahomedan or of Hindoo, or of any other law. *Whatever* has been so established by usage, has become law within the local

limits. It is on this principle that the rules of the Mahomedan law of pre-emption have been held to be in force. The Court further observed that, "the claim set up by the Plaintiff (a Hindoo *versus* a Mahomedan) is founded on the right of pre-emption, which is recognized among Hindoos in some parts of the country on the ground of custom; it has its origin, however, in the Mahomedan law, the rules and restrictions of which are considered even by the Hindoos themselves as applicable to the practice as existing among them." 8th May 1851. Dec. S. D. A. Ben. 322.

NOTE.—The Defendant (a Mahomedan) objected to the claim of a Hindoo Plaintiff, to obtain a benefit flowing from the Mahomedan law. The decision though brief contains a clear exposition of the usage arising out of the law, among others, than those for whose guidance the law was originally framed.

45. The presentation of a petition to a register of deeds, asserting a right to pre-emption in respect to property, the sale of which to another party had shortly before been registered, cannot be looked upon as *tulb-i-mowasibut*, or a preferment of the immediate claim affirmed by witnesses, required by the Mahomedan law which equally applies although the parties are Hindoos. 23rd May 1855. Dec. S. D. A. N. W. P. 235.
46. The female relatives of the proprietor of a share of an estate, not being included in the coparcenary community, are not co-sharers of such proprietor within the meaning of the *Wajib-ool-urz* of settlement in respect to the right of pre-emption, 10th July 1855. Dec. S. D. A. N. W. P. 390.
47. The pre-emptive right of a party to purchase a share in one of several villages, sold under a single deed of sale, recognized on its appearing that such party was a shareholder only in the village in which the share claimed was situate. *Ib.*
48. In the absence of proof that in fixing the price of the share claimed proportionately to what the whole of the villages had been sold for, the claimant of pre-emption had put too low a price on such share, held, that there was nothing illegal in this mode of valuation, and that the question of what was a fair price for the property was properly determinable by the Lower Courts. *Ib.*
49. Held, that even if it were a settled point that, in cases of *Shagfa*, the claim, by litigation under the Mahomedan law, should be preferred in one month, the law of limitation, as laid down in



Sec. 14, Reg. III. of 1793, cannot be superseded by such a restriction. 3d March 1856. Dec. S. D. A. N. W. P. XI. 189.

NOTE — Vide Sec. 1, Act XIV. of 1859

50. A suit between Hindoos was remanded with the following injunction: "The Judge will understand, that he is to confine himself to the single point as to whether there is proof of the plaintiff having observed all the legal forms necessary according to the Mahomedan Law on the part of the claimant to the right of pre-emption under that law, whether he be a Mahomedan or a Hindoo" 29th May 1856. Dec. S. D. A. N. W. P. XI. 363.
51. In a suit instituted by a Hindoo Talooqadar, against another Hindoo, the following decision, illustrating a particular distinctive feature in the application of the law of pre-emption, was pronounced. The appellant claims a pre-emptive privilege in the first instance as a sharer in the land sold. This claim cannot be admitted. For the appellant is not a co-sharer in the village. He holds under Government as a Talooqadar, not as a Biswadar or Mokuddum, and neither the agreements made at the time of settlement, nor the law of pre-emption as administered in our Courts, contemplate the concession of pre-emptive rights to mere Talooquaders, whose tenure, though superior, in some respects, to that of the Mokuddum or Biswadar, is inferior in those incidents which constitute proprietorship. The appellant therefore cannot prove his title on the ground of common proprietary interest with the sellers, as his relation to the estate is not identical with their's, and is moreover not such as in itself to convey a pre-emptive right. The Court proceed to consider the *second* plea, namely, the right of pre-emption on account of vicinage. On this point it is sufficient to refer to their decision in the case of Nun-koo Doobe and another *versus* Naryun Dass and others, passed on this date \*. In that decision the reasons for refusing to admit the pre-emptive title of a Hindoo claimant to an entire estate on the sole ground of vicinage are fully detailed. It will suffice here to observe that it is not in the opinion of the Court expedient to create this right and that its existence hitherto has not been proved. 23rd June 1856. Dec. S. D. A. N. W. P. XI. 389.
52. In the absence of any *positive law, established usage and judicial precedent*, the Court refused to recognize the right of pre-emp-

tion amongst parties of the Hindoo persuasion, based on *vicinage alone*.\* 23rd June 1856. Dec. S. D. A. N. W. P. XI. 393.

**NOTE.**—The following observations respecting the Mahomedan law of pre-emption when claimed by Hindus show that it cannot be administered in all cases. The Court further raised a question (which however was not determined) whether the law on this subject extended among Mahomedans themselves to every description of landed property.

"The right of pre-emption claimed in this case, is founded on ideas taken from the Mahomedan and not from the Hindu law, and carried even further (according to notions so generally prevalent throughout the country, as to amount perhaps to established custom) than the doctrine of the Mahomedan law itself countenances. It is so much recognized that in other suits which have since come before the Court, the defendants though Hindus have admitted the principle on which the pre-emption was claimed, but rested the defence on other ground, such as tender made and refused, before the sale was completed to a stranger. The Mahomedan law allows the right of pre-emption to a partner in the property of the land sold, to one participating in the immunities and privileges of it, and to a neighbour." (Hidāya, Book 38, Chap. 1.)

"There can be no doubt that in the Mahomedan law, lands are included amongst the articles concerning which *Shu'fa* or pre-emption operates, but it may admit of question whether entire *Mehals* or estates were intended, or merely parcels of land, gardens and the like. The latter view appears to be supported by a passage in the *Hidāya* which quotes a saying of the prophet, to the effect that *Shu'fa* only affects houses and gardens.

"We are not called upon to determine whether, supposing the parties to have been Mahomedans, the right of pre-emption based upon *vicinage* alone would be legally claimable; but, assuming the right as amongst Mahomedans, whether the parties in the present case being Hindus, that right must necessarily be held to extend to them.

"The Courts have based their recognition of the right of pre-emption among Hindus, first, on *prescriptive usage* and *local custom* neither of which is shown to exist in regard to the purchase of entire estates—and secondly, the *justice and propriety of the measure to prevent dissension by the introduction of strangers*."

The suit was instituted to establish the right of pre-emption in respect of an estate and its dependencies, and although the Court decided that *vicinage alone* did not confer such a right on Hindus, it will be remarked, the Judges abstained from expressing an opinion respecting the validity of such a plea, had it been advanced by Mahomedans, in a matter wherein a large estate might form the subject of dispute.

58. Held by the majority of the Court in accordance with a *futwa* of the *Cauzee-ul-Coozat*, generally, that in claiming the right of pre-emption of property, if a party in due legal form makes the *tulub-i-moasibat* or immediate demand, some delay in making the *tulub-i-ishhad*, or affirmation by witnesses, prior to the *tulub-i-khasomut*, or claim by litigations is not material, and does not under the Mahomedan law bar the claim to the right of pre-emp-

tion. Held further, that the intervention of one day between the immediate demand and the affirmation by witnesses, is not such a delay as to interfere with the Plaintiff's right of pre-emption. 25th March 1857. Dec. S. D. A. Ben. 454.

**NORM.**—Macnaghten at page 49, remarks, "it is necessary that the person claiming this right should declare his intention of becoming the purchaser immediately on hearing of the sale, and that he should *with the least practicable delay*, make affirmation by witness of such his intention, either in the presence of the seller or of the purchaser, or on the premises."

The *futwa* of the Cazeer-ool-Coozat was as follows: "In order to make the claim of Shafee (right of pre-emption) valid, *tulub-i-moasibat* (immediate demand) on being apprised of the sale is necessary, and in order to give force to that claim *tulub-i-ishhad* (affirmation by witnesses) is requisite as the claimant of Shafee will have to prove his demand of Shafee before the Judge, and this cannot be accomplished without witnesses, consequently *tulub-i-ishhad* is requisite prior to *tulub-i-khasomut* (claim by litigation), so that *tulub-i-moasibat* on the part of the claimant may be established before the Judge.

"Hence the right of Shafee is not invalidated, if there occur a delay in the performance of the *tulub-i-ishhad* subsequent to the *tulub-i-moasibat* and prior to the *tulub-i-khasomut*."

The majority of the Court thought this opinion gives greater latitude than the rule cited by Sir W. Macnaghten, but nevertheless did not deem it open to objection. Samuells, J., however, dissented, holding, that the *futwa* is quite irreconcilable with the principle stated by Macnaghten, and that if such were ruled to be the law of pre-emption, no purchaser of property from a Mahomedan would be safe. He concluded, that "the least practicable delay" is a matter of evidence, and that the Court must decide in each case whether due diligence has been used or not.

54. Held that a party with a title to share in a property though not in possession of his rights, has a right to pre-emption on the ground of coparcenary, and can perform the acts necessary by Mahomedan law, as preliminary conditions to the assertion of his right in a Court of Justice; but he cannot sue for the enforcement of that right, until his original title, which is the ground of the right to pre-emption, be itself unquestioned, and until the possession adverse to that title be removed by a decree of the Civil Court. 31st March 1857. Dec. S. D. A. Ben. 525.

55. Held further, that on looking to the right of pre-emption itself, the Court must be guided entirely by Mahomedan law; but that in considering questions regarding the mode and time at which that right is to be demanded and enforced, the regulation law of procedure, must be followed, and under this law, a derivative right cannot be asserted, until the original title whence it flows is itself clear and unquestioned. *Ib.*

56. Held, that it appears to the Courts, that the right of shafee, to be proclaimed by another on the part of the possessor of the right in his absence, cannot be delegated. 2nd July 1857. Dec. S. D. A. Ben. 1172.

NOTE.—In this case, the agent without previous communication with the claimant, and consequently without any sort of authority from him, came forward and proclaimed to the purchaser, that the plaintiff intended to claim his right. The Court were of opinion that under no circumstances could an act so unauthorized be recognized as sufficient, and that the claim should have been dismissed on this ground alone.

57. A decree in favor of a party who sued for the right of pre-emption, stipulating that he should lodge the purchase money within a month, or lose all advantages under the decree, declared inoperative on failure of observance of the condition. 30th July 1857. Dec. S. D. A. Ben. 1395.
58. Decree of the Lower Court dismissing Plaintiff's claim for pre-emption, because, although he had adopted the preliminary precautions he had failed to sue for five years, held not to have been passed on a legal ground. Case remanded. 24th Feb. 1858. Dec. S. D. A. Ben. 305.
59. In a case of pre-emption between Hindoos it was ruled that, there can be no doubt that the right of pre-emption under Mahomedan law does not apply to *moveable* property. The right extends to houses of every sort thatched as well as those which are not thatched. The restricting of the right only to those houses which cannot with ease be taken to pieces, would be in consonance neither with the letter nor the spirit of Mahomedan law. 21st April 1858. Dec. S. D. A. Ben. 771.
60. The following rule laid down in Macnaghten, page 192, on the authority of the Hedaya was declared applicable to a cause in point: "Where there is a plurality of persons entitled to the privilege of Shooftaa, the right of all is equal, and no regard is had to the extent of their several properties." 1st Dec. 1858. Dec. S. D. A. Ben. 1755.

NOTE.—The claimants held unequal portions in certain property, and it was contended that the property in which the right of pre-emption was claimed, should be divided in proportion to their respective shares.

61. In a case of pre-emption it appeared that the claimant on hearing of the sale, without adopting the other preliminary steps, immediately proceeded to the vendor's house to offer the money; held, this is insufficient to fulfil the requirements of the law of Shuffa.

or pre-emption, and that the party is not entitled to the preference he claims. 16th Feb. 1859. Dec. S. D. A. Ben. 151.

62. The Lower Court threw out a suit for pre-emption which had been instituted eight years after the cause of action arose on the ground, that the Mahomedan law of Shuffa requires, that a claim for pre-emption shall be preferred without delay. Held, in appeal, that the limit allowed for the institution of a suit by the Regulations cannot be restricted by the operation of the Mahomedan law. 20th April 1859. Dec. S. D. A. Ben. 464.
63. Held, that an individual who merely holds land on sufferance without any fixity of tenure, does not possess the right of pre-emption. 2nd June 1859. Dec. S. D. A. Ben. 714.

NOTE.—The claimant appears to have been an under-tenant.

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*The following is taken from Cowell's Digest, 1st Edition.*

The mere fact of two parties having jointly sued and obtained a decree by right of pre-emption against a third party does not preclude either from contending\* that by agreement they were not to take equal shares in the purchase. *Mussamut Berunga Koeree v. Hursperhad Lall*, 3 Agra Rep., 235.

The pre-emptor obtained a decree from the first Court, which decree provided a certain time within which the sum ascertained to be the purchase-money was to be deposited. The pre-emptor appealed against the amount fixed by the first Court, but failed: he did not deposit the money within the fixed time, and the Judge declined to fix any further time. Held that the plaintiff in appealing from the original decree could not escape from the obligation which it imposed, and the lower Appellate Court was not bound by law to insert in its decree any special direction concerning such deposit, unless occasion called for it, although it was competent to have done so. *Sheo Pershad Lall and others v. Thakoor Rai and others*, 4 Agra Rep., 254.

In a suit for the right of pre-emption, on the ground that plaintiff was a shuffee khulut, defendant, who alleged that plaintiff was only a benamsee shareholder, offered to establish his case on the deposition of the plaintiff alone. The latter not appearing on summons, the suit was decreed against him under Section 170, Code of Civil Procedure. On

this he appealed, and the Judge ordered the Moonsiff to give him further time to appear. This was granted, and then extended again and again, by a Moonsiff who, on the plaintiff failing to appear again, gave a decree against him under the same law as before. The case was then appealed to the Judge, who ordered the case to be tried on its merits, remarking, that the presence of the plaintiff was not necessary. *Jhoomuck Singh v. Jeetun Lall*, 12 W. R., 359.

*Held* that a purchaser is entitled to the profits of the property purchased by him accruing between the time of purchase and subsequent transfer to a pre-emptor. In such cases the pre-emptor ought to be made a party to the suit. *Buldeo Pershad v. Mohun*, 1 Agra Rep., R. A., 30.

Where the wajib-ool-urz provided that alienation shall be first made to brethren of common ancestor, and then to the other sharers of the puttee,—*Held* that the brethren in whose favor the first right of pre-emption was secured must be construed to be brethren who were sharers in the puttee. *Hur Sakai and others v. Jawala and others*, 2 Agra Rep., 31.

*Held* by a Full Bench, in concurrence with the lower Court, that the proper construction of the words *shikmee shayokayan* used is a clause of the administration paper was that they gave a preference to sharers in the *thoke* over those who are merely shareis in the village. *Jey Mull v. Tesree and others*, 1 Agra Rep., F. B., 171.

*Held* that, where a pre-emptive claim is based on the wajib ool-urz, it is not to be assumed that the claimant of pre-emption complied with the peculiar conditions which, under the Mahomedan law, are essential to give validity to such a claim, unless expressly provided by the wajib-ool-urz, and the Court construing such contracts ought to consider the intention of the parties as expressed in those contracts, and to give effect to them without alteration or addition. *Chowdhry Brij Lall v. Rajah Goor Sakai and others*, 1 Agra Rep., F. B., 128.

When a mortgagor in possession purchased the property mortgaged,—*Held* that his possession as proprietor commenced from the date of purchase, and limitation would run from the date of the purchase against a claimant by right of pre-emption. *Mahomed Benazeer and others v. Gunga Ram and others*, 4 Agra Rep., 260.

*Held* that the plaintiff, having refused to purchase at the sum actually given, could not come into Court and ask for a conditional decree, which is given in cases where a higher price than was actually

paid has been alleged to have been paid to the prejudice of the pre-emptor *Kudhara and others v. Khuman Singh*, 1 Agra Rep., A. C., 265.

In a suit by A to enforce a right of pre-emption, in which the purchase to B was admitted, but it was alleged that B's deed of purchase had been ante-dated, the *onus* lay on A to prove that B's deed had been ante-dated; and on the failure of A to substantiate that fact, and to prove that B had taken possession within one year previous to institution of the suit, A was held barred by Clause 1, Section 1, Act XIV. of 1859. *Kumar Ali and others v. Asmut Ali and others*, 8 W. R., 383.

A contract having been entered into for sale and purchase of certain property, the plaintiff, pre-emptor, was not bound to defer the enforcement of his right of purchase till the bill of sale had been delivered or registered, or payment made. *Luchmee Narain and others v. Bheemul Doss*, 8 W. R., 500.

In a suit to enforce a right of pre-emption, where there is no other evidence, and the Court can come to a distinct finding upon it, it is not incumbent on the Court to put the purchaser upon his oath. Where evidence is gone into, the Court must decide according to the view it takes of the evidence, any preference which may be given to the evidence for the person claiming the right of pre-emption being given only in the event of the evidence being very evenly balanced. *Hunraj Singh v. Rask Behary Singh and others*, 7 W. R., 211.

In a suit to enforce a right of pre-emption, where there is evidence in support of the pre-emptor's statement of price, the Court is justified in proceeding on that evidence alone, without calling on the purchaser to take oath to the amount of purchase-money. *Hunraj Singh v. Choka Singh and others*, 7 W. R., 486.

Held that, in a previous ruling of the High Court (1 W. R., 234), the Court only meant to say that it could not be held upon decisions that were in conflict with other decisions of the same district that the custom of pre-emption prevailed there; it did not say that, when there were decisions tending the same way, that that would not be satisfactory proof of the fact. *Kedrutoolla v. Mohuree Shaha and others*, 9 W. R., 537.

In decreeing a right of pre-emption, a Civil Court has no power to make the decree-holder's right depend on payment of the purchase-money within a specified time. *Synd Asan Ali v. Sahokhes Bibee*, 10 W. R., 53.

Conflicting decisions of the Subordinate Courts held not to prove that the custom of the right of pre-emption under the Mahomedan law prevails among the Hindus of Chittagong. *Inder Narain Chowdhry v. Mahomed Nazirooddeen*, 1 W. R., 234.

*Quære*.—Whether the Hindus of Chittagong have adopted the Mahomedan law of pre-emption. *Nasirooddeen Khan v. Indernargin Chowdhry*, 5 W. R., 237.

Where a party sues under a title by pre-emption to an estate which has been sold, he cannot claim to recover money paid as revenue on account of the estate until the suit has been decided. *Mussamut Wozeer Begum v. Mussamut Fuzloonissa*, W. R., 1864, 373.

The custom of pre-emption has been recognized among Hindus in the Province of Behar. *Mussamut Joy Koer v. Suroop Narain Thakoor*, W. R., 1864, 259.

When a Mahomedan claims pre-emption against a Hindu under Mahomedan law, there must be a distinct plea of custom as a plea of fact. *Hubeebul Hossein v. Lalla Dewkee Nundun*, W. R., 1864, 75.

The right of pre-emption by a Mahomedan as against a Hindu purchaser can only be enforced in Tipperah after proof of the right or custom of pre-emption existing generally in that part of the country, in cases in which Mahomedans are not, or are only partially, concerned. *Dewan Bunwar Ali v. Syud Azkurooddeen Mahomed*, 5 W. R., 270.

*Quære*.—Whether the law of pre-emption extends to transactions as between Hindus in Jessore. *Madhub Chunder Nath Biswas v. Tamee Bewah*, 5 W. R., 279.

Where shares in a mouzah were by arrangement between the parties made over to manage upon trust to pay part of the profits to the debtors of the transferers, and the residue of the profits to the transferers, who bound themselves not to alienate until the debts were paid,—*Held* that it was not such alienation as would confer on the plaintiff a right of pre-emption under wajib-ool-urz. *Outar Singh v. Mussamut Ablakhee Koonwar*, 3 Agra Rep 328.

#### *Nature of Pre-emption.*

Under Mahomedan law, the right of pre-emption does not accrue until a sale has been actually made, and it is not incumbent on the pre-emptor to produce the price at the time of making his claim; nay, he may contest the matter during the sitting of the Judge, but he should produce the price after the decree has been pronounced.



A shareholder in the property sold has the first and strongest right of pre-emption; there is nothing in the Mahomedan law which restricts the right of a co-parcener in the property of the land sold to a small or large portion of land, and it devolves, on his relinquishing it, even to a partner on the road. *Jahangir Buksh v. Bhikaree Lall*, 11 W. R., 71.

Where a right of pre-emption under Mahomedan law is claimed, it is not incumbent on the pre-emptor to tender or produce the price at the time of making his claim. *Heera Lall and others v. Moorat Lall* 11 W. R., 275.

To establish a claim to pre-emption under the Mahomedan law, it is not enough to prove that the ceremony of tulub-mowasibat was performed; it is also necessary to prove the tulub-istihad. *Narbhase Singh and others v. Luckee Narain Pooree and others*, 11 W. R., 307.

Although, according to Mahomedan law books, it is not necessary, in respect to the tulub-mowasibat, or first preliminary required to establish a right of pre-emption, that witnesses should hear the exclamation it involves, yet it does not follow that, as matter of evidence, Courts of law are bound to decree a suit to establish such a right, simply on the deposition of the plaintiff. *Abdool Hossein Khan v. Gobind Chundra Shaha and others*, 11 W. R., 404.

Pre-emption applies only to sales. A lease in perpetuity, with a rent (however small) reserved, is not a sale, and cannot therefore be the subject of pre-emption. *Moooly Ram v. Huree Ram and others*, 8 W. R., 106.

An unsigned wajib-ool-urz is not binding on the co-sharers, and cannot originate a right of pre-emption if no prior usage existed. To prove usage, it is not necessary that documentary evidence should be adduced. *Joykishore Singh v. Thakoor Dass and others*, 4 Agra Rep., 75.

Held that the wajib-ool-urz does not confer any right of pre-emption on the co-sharers where it only provides that the shareholders should sell with the consent of brethren and co-sharers. *Babboo Doobey v. Ishree*, 4 Agra Rep. 74.

Held that the right of pre-emption, when once allowed and exercised by the pre-emptor, cannot be disputed at subsequent occasion of sale, and that neither manhood, puberty, justice, or respectability of character, are conditions of pre-emption under the Mahomedan law. *Mussamat Punna v. Juggur Nath*, 1 Agra Rep., A. C., 236.

Held that the parties to pre-emption being Mahomedans must be bound by the strict conditions of law of pre-emption, and that the offer

to purchase before the Registrar at the time of registration of the sale deed is not a sufficient compliance with the provisions of that law. *Kareemooddeen v. Moizooddeen Khan*, 1 Agra Rep., A. C., 184.

The right of pre-emption is not matter of title to property, but is rather a right to the benefit of a contract; and when a claim is advanced on such a right, it must be shown that defendant is bound to concede the claim, either by law or by some custom to which the class of which he is a member is subject on grounds of justice, equity, and good conscience. *Moheesh Lall v. John Christian and Co*, 8 W. R., 446.

The "tulub-i-istihad" is a preliminary act as essential as the "tulubi mowasibat" to secure to the claimant the right of enforcing pre-emption. There should always, therefore, be a distinct finding as to whether it was properly made or not. *Rajeeooddeen v. Zeemut Bibee*, 8 W. R., 463. .

The right of pre-emption accruing during minority is not to be kept suspended until majority. *Meer Murtaza v. Lala Nurshing Sukas and others*, 7 W. R. 86.

A re-sale cannot destroy the right of pre-emption in a property the sale of which is admitted by the vendor. *Puttooaram v. Sham Lall Shahoo and another*, 7 W. R., 206.

The Mahomedan law of pre-emption was never intended to apply to a case in which the purchaser is not a stranger, but one who is already either a shareholder or a neighbour. *Teeka Dharee Singh v. Mohor Singh and others*, 7 W. R., 260.

A claim to pre-emption should be made as soon as the claimant becomes aware of the completion of the sale. *Mohunt Ajoodhya Poorea and others v. Mohun Lall and others*, 7. W. R., 128.

It is not incumbent on a pre-emptor to tender the price at the time of making his claim. *Khoffeh Jan Bibee v. Mahomed Mehdee*, 10 W. R., 211.

A person entitled to pre-emption under the Mahomedan law, has a right to take over a bargain in its entirety, but not to have it divided, and the consideration apportioned between the several lots of the property. *Rughoo Nundun Singh v. Muzbooth Singh*, 10 W. R., 379.

According to the Mahomedan law of pre-emption, the first thing to be done by the claimant of pre-emption is to make the preliminary declarations. First going to his house to get the money is not a compliance with the law. *Mona Singh v. Mosrad Singh*, 5 W. R., 203.

No right of pre-emption arise on a mere conditional sale or mortgage while any right of redemption remains in the mortgagor.

A mere declaration of an intention to exercise a right not yet accrued, is not a claim of a right of pre-emption. It is immaterial whether a formal demand of pre-emption is made at any other time than after the sale become absolute (*dissentiente* Bayley, J.) *Goordyal Sundur v. Rajah Teknarain Singh*, 2 W. R., 215.

To establish a claim to pre-emption, it is indispensable that all the necessary ceremonies should be performed. *Issur Chuunder Shaha v. Mirza Nisar Hossein*, W. R., 1864, 351.

The act of a claimant rising from his seat to claim his right of pre-emption, instead of claiming it as he sat, is not a delay sufficient to entail a forfeiture of his right. *Maharaj Singh v. Lallah Bheechook Lall*, W. R., 1864, 294.

Under the Mahomedan law it is essential to the right of pre-emption to prove the performance of the *tulubi-istahad*. *Bhowanee Dutt v. Lokhoo Singh*, W. R., 1864, 61.

In a suit for pre-emption, proof of performance of the preliminaries prescribed by the Mahomedan law is essential. *Mussamut Hosseinee Khanum v. Mussamut Lallun*, W. R., 1864, 117.

According to Mahomedan Law, the affirmation by witness need not be made by the claimant of the right of pre-emption in person, but may be made by a duly constituted agent. *Mussamut Ojheoonissa Begum v. Sheikh Rustum Ali*, W. R., 1864, 219.

Under Mahomedan law, the right of pre-emption does not arise until the seller's right of property has been completely extinguished. *Mussamut Soonder Kooer v. Lalla Rughoobor Dyal and others*, 10 W. R., 246.

#### *Where Pre-emption is allowed.*

A person having a right of pre-emption under the Mahomedan law is not precluded from claiming that right at a period subsequent to the sale of the property, if he neither declined the purchase nor gave permission for the sale to others. *Huro Doot Naran Singh v. Beer Narain Singh and others*, 11, W. R. 380.

*Held* (by Kemp, J.) that a partner's right of shuffee or pre-emption is not extinguished until a formal division has taken place defining each co-proprietor's share. *Wahed Ali Khan v. Hunooman Persaud*, 12 W. R., 481.

Where there is imperfect partition, viz., where the land is divided, but the joint liability to the Government remains, and the property is not made into separate mehals, the right of pre-emption is not lost. *Ram Persaud v. Buljeet Singh*, 2 Agra Rep., A. C., 252.

*Held* that the person in whose favor a preferential right of purchase is stipulated for, by the terms of the *wajib-dol-urz*, is entitled to a decree if he comes forward and claims his right, without unreasonable delay after he hears that a sale has been made without any tender to him, although he may not have proved specially that he has fulfilled all the conditions required in the case of a claim of pre-emption under the Mahomedan law of Shuffa. *Koulu Put v. Moharaj Dapbey*, 1 Agra Rep., A. C., 378.

*Held* that the plaintiff who had a preferential right to purchase, and had no opportunity offered him, had a right to enforce those conditions, a compliance with which was essential before alienation to others. *Abdoolah Khan v. Ameerun and others*, 1 Agra Rep., A. C., 274.

*Held* that a preferential right to purchase is not lost merely by the inclusion of the names of the sons of the purchaser in the sale deed, if it be proved that the actual purchaser was the father, and the names of the sons were included in accordance with the prevailing usage, without any intention to defraud the other co-sharers. *Dowlut Singh and others v. Kedar Singh and others*, 4 Agra Rep., A. C., 25.

*Held* that the indebtedness of the pre-emptor does not invalidate his right of pre-emption. *Ram Khelawan Rai and others v. Shiva Dass and others*, 1 Agra Rep., 76.

Exercise of right of pre-emption allowed in respect of a kotee and golah, as it was proved that according to local usage and custom such properties were subject to pre-emption. *Kesho Rai and others v. Binayak Rai and others*, 4 Agra Rep., 170.

One of two joint sharers has no preferential title to the right of pre-emption in his capacity of neighbour, but is equally entitled with his co-sharer to the privilege of pre-emption, without regard to the extent of their shares. *Roshun Mahomed and others v. Mahomed Kutum and others*, 7 W. R., 150.

In a putteedaree village the sharers in each puttee have a preferential claim to the right of pre-emption in that puttee. *Maharaj Singh v. Beechook Lall*, 1 W. R., 233.

When part of an estate is sold in execution of a decree, a co-sharer in the estate is a partner in the thing actually sold; and according to

Mahomedan law is entitled to the right of pre-emption. *Imamooddeen Sowdagur v. Abdool Sobhan*, 5 W. R., 170.

A pre-emptor may sue any time before the expiry of a year from the date of transfer of possession. A mortgagee's absolute right and his claim to pre-emption arise from the time the sale becomes absolute. *Mussamut Jankes Kooer v. Mussamut Teranee Kooer*, W. R. 1864, 285.

The right of pre-emption, according to the Mahomedan law, may be exercised upon a resale of the property, after a previous sale which has fallen through, and with respect to which no claim of pre-emption was made. *Busunt Koomaree v. Kali Persad Singh*, Marsh., 11.

In a suit based on a right of pre-emption, where plaintiff had proved the due observance of the necessary preliminaries, and claimed as a partner in certain julkur and nemuksaher which was still held joint, though the land had been divided between plaintiff and the defendant's vendor,—*Held* that notwithstanding the division of the land, the immunities and appendages thereof were still held in co-parcenary. Plaintiff, as owner of one puttee, was entitled to a right of pre-emption over a stranger in respect of the other puttee which was sold. *Mahtab Singh v. Ram Tuhai Misser*, 10 W. R., 314.

A right or custom of pre-emption is recognized as prevailing among Hindus in Behar and some other provinces of Western India. In districts where its existence has not been judicially noticed, the custom will be matter to be proved. Such custom, where it exists, must be presumed to be founded on and co-extensive with the Mahomedan law upon that subject, unless the contrary be shown. The Court may, as between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, where it is shown that the custom in that respect does not go the whole length of the Mahomedan law of pre-emption. But the assertion of right by suit must always be preceded by an observance of the preliminary forms prescribed in the Mahomedan law. *Fukeer Rawot and others v. Sheikh Eman Buksh and others*, W. R., F. B., 143.

Where Government confiscate the share of a convict, and sells it for valuable consideration, the co-sharers have a right to claim such share by right of pre-emption on such sale, and the condition of *wajib-ool-urz* is binding on Government as much as it was on the original owner, Government acquiring the share subject to the same condition as the former held it. *The Collector of Futtehpore v. Syud Yed Ali*, 1 Agra Rep., A. C., 88.

Where the *wajib ool-urz* provided that, in cases of transfer by "sale, &c," the co-sharers will have preferential right to the same,—*Held* that the co-sharers were entitled to claim by right of pre-emption to take over an usufructuary lease which was made for the term of eight years. *Ahmed Ali Khan and others v Ahmed and others*, 1 Agra Rep., A. C, 101.

*Held* that a pre-emptor is not precluded from claiming the property by right of pre-emption, because he opposed the mutation of names only on the ground that the vendor was not in possession.

*Held* also that the mere admission of the vendor that an old debt of Rs. 500 formed part of the consideration was not conclusive evidence of the allegation. *Pecra and others v. Shimbhoo and others*, 3 Agra Rep., 318.

*Where pre-emption is not allowed.*

Possession of a separate share of an estate divided by butwarra gives the owner no right of pre-emption as a "suffeh-khullat" over the remaining portion.

Where possession of such separate share and vicinage have been alone urged in the lower Courts as the grounds of a claim to pre-emption, plaintiff cannot be allowed for the first time in special appeal to rest the claim on the fact of joint ownership with the defendant in the appendages of the land, even though evidence of such fact is found in the butwarra papers on which plaintiff based his suit. *Mohadeo Singh v. Mussamut Zeenutoonissa and others*, 11 W. R., 169.

In a suit to recover by right of pre-emption, on the ground that plaintiff was in the position of a co-partner in the property to be sold, notwithstanding a private separation having taken place between the shareholders, inasmuch as he was still liable for arrears of Government, and might still apply for a public butwarrah,—*Held* that, as plaintiff had divided off his own share by regular metes and bounds, and made himself in every respect independent of his co-partners so far as lay in his power to do so, he had by his own act deprived himself of any advantage which the law might have given him under different circumstances. *Byj Nath Singh v. Dooly Matoon and others*, 11 W. R., 215.

In a suit for a declaration of plaintiff's right of pre-emption in a property which had been originally mortgaged, but which, owing to a subsequent arrangement, had not passed from the mortgagor to the mortgagee,—*Held* that, as the ownership was still with the mortgagor,

who could redeem his property within a stipulated period, no right of pre-emption had arisen from the Mahomedan law. *Bhowanee Pershad v. Purahtonno Singh and others*, 11 W. R., 282.

*Quære*.—Whether, as between owners of adjacent plots of land, pre-emption can exist by right of vicinage. *Nirput Muhtoon and others v. Mussamut Deep Koonwar*, 8 W. R., 2.

Unless a prescriptive usage and local custom be clearly established, a Hindu defendant is not bound by the Mahomedan law in a case in which a Mahomedan seeks to enforce his right of pre-emption. *Sheraj Ali Chowdry v. Ramjan Bibee and others*, 8 W. R., 204; 2 Ind. Jur., N. S., 249.

Where a resumed maafee "chuck" was aliened by the holder thereof, and a preferential right to take it was claimed by a sharer in the zemindaree under the terms of wajib-ool-urz agreed to by the co-sharers at the time of settlement, and to which the holder of the "chuck" was no party,—*Held* that such alienation was not an alienation of a share within the meaning of the wajib-ool-urz; that the holder of the "chuck" would neither confer on its possessor a right of pre-emption, nor subject his estate to such right in the event of alienation. *Sheo Lal Sahoo v. Sheikh Rumzanee*, 2 Agra Rep., A. C., 35.

*Held*, on the construction of "wajib- ol-urz," that the condition stipulating that alienations should be made with the consent of all the sharers does not stipulate for the existence of pre-emption, and that the claim based on that was untenable. *Ram Pershad Shahoo and others v. Sheikh Rumzanee*, 1 Agra Rep., 37.

*Held* that occasional instances, in which a claim to pre-emption on the ground of vicinage may have been admitted, or for special reason the vendors submitted to the claim, are not sufficient to prove the custom of pre-emption in a mahallah, but repeated instances of the assertion of pre-emption as a right and of its recognition or enforcement, ranging over a long period of time and in various places, should be shown. *Sheo Churn Kandoo v. Gooder Burnawar*, 4 Agra Rep., 138.

*Held* that a claim for pre-emption would not lie against the purchaser of a confiscated property sold by the revenue authorities. *Mohamed Villayet-ool-lah Khan v. Ahmed Hossein Khan and others*, 4 Agra Rep., 70.

*Held* that in a case of private sale the right of pre-emption must be based on usage or contract, and that an instance of pre-emption in an auction sale is not sufficient. *Mussamut Bhui Koonwar v. Zahoor Ali and Piman Singh*, 1 Agra Rep., A. C., 258.

*Held* that a solitary case or two is not sufficient to prove the custom of pre-emption in a locality where the privilege is not binding upon the parties by positive law. *Benersee Dass v. Phool Chund*, 1 Agra Rep., A. C., 243.

Where a plot of land formerly held rent-free situate in a pure zemindaree estate is sold at auction,—*Held* that the claim of preferential purchase under Section 14, Act XXIII. of 1861, would not lie, as the estate was not a putteedaree estate within the meaning of Section 2, Act I. of 1841. *Ghooro Singh v. Dabee Dyal*, 2 Agra Rep., A. C., 280.

In a suit claiming a right to pre-emption, where it was found as a fact that the sale had not been completed, and that there had not been cessation of the vendor's right, it was held that, whether under the ordinary principles which relate to contracts of sale, or under the principles of Mahomedan law, no right could arise in favor of the pre-emptor. *Mussamut Ladun v. Bhyro Ram*, 8 W. R., 235.

The Mahomedan law of pre-emption on the score of vicinage applies only to houses or small plots of land, and not to large estates, or to a claim based on partnership when it is in proof that a separation of the estate has been effected. *Chowdhry Joogul Kishore Singh and others v. Poocha Singh and others*, 8 W. R., 413.

Petitioner was a co-sharer in an estate in Zillah Sylhet. The right and interest of another co-sharer in the same estate being put up for sale in execution of a decree, the petitioner claimed it under Section 14, Act XXIII. of 1861. The Principal Sudder Ameen thereupon substituted him for the actual purchaser. The Judge in appeal reversed this order, on the ground that putteedaree estates were unknown in Sylhet. Petitioner asked for the interference of the Court under Section 35 of the same Act. *Held* that, in such circumstances, the Court executing a decree had no authority to substitute the claimant for the actual purchaser without the consent of the latter, and that a party claiming a share under the section cited is simply in the position of a party who, having a right of pre-emption, has observed the requisite formalities to enable him to assert the right, and must resort to a civil suit to obtain the benefit thereof. The orders of the lower Courts were set aside accordingly. *Synd. Abdool Jateel v. Kallee Coomarr Dutt*, 6 W. R., Mis., 3.

No right of pre-emption can exist as against a co-parcener.

The custom of pre-emption, as applicable to Christians in Bhagulpare, must be proved on the same principle as has been applied to Hindus in Behar. *G. Christian and others v. Moheshee Lall*, 6 W. R., 250.



A plaintiff suing to establish a right of pre-emption, on the ground of co-partnership with the vendor, cannot be allowed to travel beyond his plaint, and obtain a decree by right of vicinage. *Koonj Behary Lall v. Gridharee Lall*, 10 W. R., 189.

The plaintiff relies upon the custom of pre-emption prevailing between Mahomedans and Hindus in Sylhet. *Held* that, unless he can show that the custom is undoubted and invariable, he is not entitled to a decree. *Jameelah Khatoon v. Pagul Ram*, 1 W. R., 251.

A person who has been offered his right of pre-emption, and has refused it cannot afterwards re-assert that right as against a sale made with his direct permission to a third party. *Sheo Tahul Singh v. Mussamut Ram Koor*, W. R., 1864, 311.

Pre-emption is not a right to be found in any Hindu law book, but is allowed and practised by custom in some parts of the country. Before the right can be claimed, the plaintiff must prove the existence of the custom in the district where the property is situated. *Ramgully Surma v. Kasi Chunder Surma*, W. R., 1864, 317.

A transfer, without money or other consideration, and which is in fact a gift, is held not to be a sale to which the right of pre-emption attaches. *Syad Ameer Ali v. Mussamut Bebee Pearun*, W. R., 1864, 239.

The right of pre-emption cannot be exercised by a judgment-creditor in respect of the sale of property in execution of his decree. *Sheikh Nuzmoodeen v. Kanye Jha*, Marsh., 555.

Where a stipulation in the *wajib-ool-urz* prohibits alienation by any member of the co-parcenary body, without the consent of the other co-sharers,—*Held* that such a condition does not confer any right of pre-emption on a co-sharer, and no decree for pre-emption can be given on the basis thereof, but a co-sharer has the right to have the sale cancelled if made without his consent. *Gayadeen v. Ramshah and others*, 3 Agra Rep., 181.

Where a vendor in selling his property got the vendee to execute another deed in his favor for certain beegahs of land for his maintenance; and subsequently, on the completion of the bargain, a co-sharer took that property by right of pre-emption,—*Held* that the agreement, being in fact a part of the consideration for sale and *bona fide*, was binding on the pre-emptor, who cannot claim to have the bargain made with him on more favorable terms than those offered by the stranger, and accepted by the vendor, the fact that he was no party personally to the agreement notwithstanding. *Abail Singh v. Heera Dass*, 1 Agra Rep., A. C., 75.

*The following is a digest of all the cases on Pre-emption reported in the Indian Law Reports, Complete Series, from the beginning up to the number for May 1878; in all the 15 Volumes of the Bengal Law Reports as well as the Supplemental Volume containing Full Bench decisions; in the Law Reports, Indian Appeals, from the beginning up to the number for April 1878; in the Bombay High Court Reports, from Vol. X. to the last number; and in the 6, N. W. P. High Court Reports.*

- (1.) *Pre-emption—Act VI. of 1871, s. 24—Mahomedan Law—*  
*“Justice, equity and good conscience.”*

Under s. 24 of Act VI. of 1871, Mahomedan law is not strictly applicable in suits for pre-emption between Mahomedans not based on local custom or contract, but it is equitable in such suits to apply that law.

The application of Mahomedan law in a suit for pre-emption between a Mahomedan claimant of pre-emption and a Mahomedan vendee, on the basis of that law, is not precluded by the circumstance of the vendor not being a Mahomedan. 6 N. W. P., H. C. Rep., p. 28.

- (2.) *Talab-istihad—Ceremonies.*

It is necessary to the enforcement of the right of pre-emption that all the prescribed formalities should be strictly complied with. To the ceremony of istihad or talab-istihad, it is essential that there should be an express invocation of witnesses. 2 B. L. R. (A. C.) 12.

- (3.) *Talab-istihad—Mode of performance.*

The personal performance of the talab-istihad, or demand for pre-emption by the pre-emptor, depends on his ability to perform it. He may do it by means of a letter or messenger, or may depute an agent, if he is at a distance and cannot afford personal attendance. 4 B. L. R., (A. C.) 139; and 6 B. L. R., p. 167. (*Note*.)

(4.) Under the Mahomedan Law, the legal forms to be observed under that law by a person claiming a right of pre-emption may be observed on behalf of such person by an agent or manager of such person. The right of pre-emption may be claimed after a sale notwithstanding there has been a refusal to purchase before the sale, where there has been no absolute surrender or relinquishment of the right, and such refusal has

been made simply in consequence of a dispute as to the actual price of the property. I. L. R., 1 All., p. 521.

(5) *Performance of talab-istihad—Invocation of witnesses to demand.*

According to the Mahomedan law, it is essential to the performance of the talab-istihad that third persons should be formally called upon, either in the presence of the purchaser or on the land; or, if the vendor is in possession, in the presence of the vendor, to bear witness to the demand. 6 B. L. R., 165.

(6) *Talab-istihad—Time within which to be performed.*

It is not a binding rule of law that the talab istihad by a pre-emptor, if made within a day after the receipt of the intelligence of the purchase, is necessarily in time for the preservation of the right of pre-emption. The due and sufficient observance of the formality of talab-istihad, as to time, is a question to be decided in each case by the Court which has to deal with the facts. 8 B. L. R., (F. B.) 160.

(7) *Talab-mawasabat—Time within which to be performed.*

According to the Mahomedan law, the mere fact of the pre-emptor taking a short time before performance of the talab mawasabat for ascertaining whether the information conveyed to him was correct or not, does not invalidate his right. The Mahomedan law allows a short time for reflection before performance of the first demand. 6 B. L. R., (A. C.) 208.

(8) On hearing of a sale, the pre-emptor must immediately make his demand called talab-mawasabat. Where a pre-emptor, on hearing of the sale of a property to which he had a right of pre-emption, went to the property in dispute and there declared his right as pre-emptor, *held*, that such delay was fatal to his claim. 6 B. L. R., (A. C.) 216.

(9) *Talab-mawasabat, and talab-istihad—Performance of preliminary ceremonies.*

In the case of pre-emption strict proof is necessary of the performance of the preliminaries. According to the Mahomedan law, strict adherence to the rules for the performance of the talab-istihad is especially necessary. In performing the talab-istihad the pre-emptor must clearly declare his right and invoke witnesses. He must declare that "he has a right of pre-emption to which he has laid claim, and that he still claims it," and invokes witnesses "to bear witness therefore to the fact." 6 B. L. R., (A. C.) 171.

(10.) *Performance of preliminary ceremonies—Talab-istihad—Hindus.*

To the due performance of the ceremony of *talab-istihad*, it is not necessary that any particular form of words should be employed. 8 B. L. R., p. 455.

(11) *Suit to enforce pre-emption to portion of property sold.*

Under a deed of sale the vendor conveyed to the purchaser five lots of land. In a suit by a third party to enforce a right of pre-emption in respect of one out of the five plots, *held*, that he could divide the bargain and sue on the ground of pre-emption for a portion only of the property covered by the deed of sale. 6 B. L. R., p. 386.

(12.). The property of several co-sharers, some of whom were minors, was sold to a single purchaser, under a deed of sale, which contained a covenant by the vendors, who professed to act on behalf of themselves and the minors, that they would compensate the vendee for any loss he might incur should the minors, when they came of age, not ratify the sale. A sued to enforce her right of pre-emption in respect of the lands sold. The lower Appellate Court was of opinion that A could not enforce her claim of pre-emption in respect of the share of the minors; and on the Court's suggestion the plaint was amended, so as to ask for enforcement of her claim in respect only of the shares of the vendors of full age. *Held*, that A was bound to claim her right against all the shares, and could not enforce it in respect of some only. 1 B. L. R., (A. C.) 78.

(13) *Surrender of right of pre-emption before sale.*

Where an offer of sale was made to a pre-emptor, and he refused to avail himself of it, and consented to a sale to a stranger, *held*, that after a sale to a stranger he could not set up his right of pre-emption. 7 B. L. R., 19.

See also 7 B. L. R., p. 24 (Note.)

(14) *Refusal to purchase when property offered for sale. Subsequent suit to enforce right—Estoppel.*

A Mahomedan offered to sell his share of certain property to a partner, and on the refusal of the latter to purchase the same, sold it to a stranger. *Held*, the partner could not sue to enforce his right after the sale. 9 B. L. R., 253.

(15) *Mortgage—Foreclosure of equity of redemption.*

In the case of a mortgage, the right of pre-emption does not arise  
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until the equity of redemption is finally foreclosed. B. L. R., (Sup. Vol) 161.

(16) *Mortgage—Foreclosure—Possession by mortgagee.*

On the foreclosure of a mortgage, after the expiry of the year of grace, but before a decree for possession had been obtained by the mortgagee, a suit to enforce the right of pre-emption in respect of the property mortgaged is maintainable. 6 B. L. R., Ap., 114.

(17) *Subsequent reconveyance by purchaser to vendor—Effect of, as against right of pre emptor.*

Where one of two neighbours has sold his land to a stranger, and the other neighbour has thereupon claimed a right of pre-emption, no subsequent dissolution of the contract affects the right of the pre-emptor which has once accrued and been duly asserted. 4 B. L. R., (A. C.) 219.

(18) *Right of pre-emption in large or small estates.*

The right of a shareholder to pre-emption exists whether the parcel of land sold, and in respect of which the claim is made, be large or small. 6 B. L. R., 42 (Note.)

(19) *Right of partner to pre-emption in sale of villages or large estates—Vicinage.*

According to the Mahomedan law, a partner has a right of pre-emption in villages or large estates. But a neighbour cannot claim such a right on the ground of vicinage. 6 B. L. R., (F. B.) 41.

(20) *Vicinage.*

The right of pre-emption on the ground of vicinage is limited to parcels of land and houses, and does not extend to the purchase of an entire estate, even though it be entirely surrounded by the lands of the would-be pre-emptor. 2 B. L. R., (A. C.) 63, 10 W. R., p. 356.

(21) There is no judicial finding to the effect that the custom of pre-emption is recognized among the Hindus of the province of Behar. It is doubtful whether, even under Mahomedan law, the owners of two adjacent lakhirij estates, wholly unconnected with one another, could either of them claim a right of pre-emption on the ground of vicinage. No such right of pre-emption on the ground of the mere vicinage has been known to exist among Hindus. 2 B. L. R., (A. C.) 330; 11 W. R., p. 251.

(22) *Irrigation.*

Under the Mahomedan Law, the owner of the land, through which

the land in respect of which a right of pre-emption is claimed, receives irrigation, has a preferential right to purchase rather than a mere neighbour. 3 B. L. R., (A. C.) 296.

(23) *Owners of separated share of estate—Shafee Khalit.*

The proprietor of a divided one-anna share in a four-anna share of an estate is not entitled to a right of pre-emption as a *Shafee Khalit* in the remaining three-anna share. *Quære*. Whether, if there remained any adjoining ground in which the community of interest still continued since the separation, he would be entitled in right of vicinage to pre-emption, the point not being allowed to be taken. 7 B. L. R., 45 (Note.)

(24) *Khalit—Sharik—Partition, effect of, as to pre-emption.*

The word 'khalit' is not improperly used in a plaint in a pre-emption suit to designate a sharik or partner in the substance of a thing; and if it is not clear whether the plaintiff claimed pre-emption as khalit or sharik, it may be shown by express words, or it may be inferred from the written statement whether the plaintiff claimed on the one or on the other ground. Where the intention of the co-proprietors of an estate is to make a complete batwara of the whole, but an inconsiderable part is by over-sight or accident left out of the division, that will not have the effect of giving one co-proprietor a claim of pre-emption on the sale to a stranger by another co-proprietor of his share of division of the estate. *Semble*. Where an integral portion or property, as a wall, is left purposely joint and undivided, the community of interest continues. 7 B. L. R., p. 42.

(24 A.) Pre-emption extends to agricultural estates and is not merely confined to urban properties or small plots.

Where there are several properties to which a common appurtenance in the shape of an undivided plot of land, a few trees, and tanks, is attached, partners in the appurtenance can claim pre-emption in respect of the properties. 6 N. W. P., High Court Reps, p. 377.

(25) *Europeans—District of Cachar.*

The right of pre-emption arises from a rule of law by which the owner of the land is bound. It is essential that the vendor should be subject to the rule of law. Therefore, where the vendor of certain land situate in Cachar was a European, the Court held that there was no right of pre-emption. 10 B. L. R., 117.

(26) *Mahomedan vendor and co-sharer, and Hindu purchaser.*

*Per* PEACOCK, C. J., and KEMP and MITTER, JJ.—A Hindu purchaser is not bound by the Mahomedan law of pre-emption in favor of a Mahomedan co-partner, although he purchased from one of several Mahomedan co-parceners; nor is he bound by the Mahomedan law of pre-emption on the ground of vicinage. A right of pre-emption in a Mahomedan does not depend on any defect of title on the part of his Mahomedan co-partner to sell, except subject to the right of pre-emption, but upon a rule of Mahomedan law, which is not binding on the Court, nor on any purchaser other than a Mahomedan. *Per* NORMAN and MACPHERSON, JJ. (*dissentientes*) wherever a Mahomedan co-sharer or neighbour has a right of pre-emption, and his property is sold by his neighbour or co-sharer, also a Mussulman, his right is not defeated by the mere fact that the purchaser is a Hindu. 4 B. L. R., (F. B.) 134.

(27) *Hindus—Province of Behar—Custom.*

A right or custom of pre-emption is recognized as prevailing among Hindus in Behar and some other provinces of Western India. In districts where its existence has not been judicially noticed, the custom will be matter to be proved; such custom, when it exists, must be presumed to be founded on and co-extensive with the Mahomedan law upon that subject, unless the contrary be shown. The Court may, as between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, where it is shown that the custom in that respect does not go the whole length of the Mahomedan law of pre-emption, but the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in Mahomedan law. B. L. R., (Sup. Vol.) p. 35.

(28) *Sale in execution of decree—Right of Pre-emption.*

When property is sold by public auction at a sale in execution of a decree, and the neighbour or partner has the same opportunity to bid for the property as other parties present in Court, the law of pre-emption does not apply. 1 B. L. R., p. 105; 10 W. R., p. 155.

(29) A share in a mouzah having been put up for sale in the execution of a decree, and knocked down to the defendant, a stranger, the plaintiff a co-sharer of the share was held to be entitled, under the provisions of s. 14, Act 23 of 1861, to take the share. 6 N. W. F., H. C. Rep., p. 243.

(30) If a person claiming pre-emption under the provisions of s. 14, Act 23 of 1861, fulfils the conditions of sale respecting the deposit of the purchase-money, the sale cannot be held void merely by the failure of the person to whose bid the property was knocked down also to complete the deposit. All that the claimant is bound to do is to establish that he is a *putteedar* within the meaning of the section in the estate of which the property sold forms part, and that he has fulfilled the conditions of sale. If he establishes this the sale must be confirmed in his favor, unless some irregularity in publishing or conducting the sale is shown which would justify the setting aside of the sale. The conditions of pre-emption under the Mahomedan law do not apply to a claim brought under the section. 6 N. W. P., H. C. Rep., p. 289.

(31) It is incumbent on an officer conducting a sale in execution of decree of land, which is a share of a *putteedaree* estate paying revenue to Government, as defined in s. 2 of Act I. of 1841, to take notice of a claim made by a person under the provisions of s. 14 of 23 of 1861, and to receive the purchase-money as a fulfilment of the conditions of the sale, subject to any question which may be raised by any party interested in the sale as to the claimant's title to advance the claim. When the whole of the purchase-money has been paid by the claimant within due time, the Court executing the decree, unless it is satisfied that he has no right to advance the claim, cannot treat the payment by him as a nullity, but must accept it as a fulfilment of the conditions of the sale respecting the purchase-money, and the sale is not defeasible by the failure of the bidder to complete the deposit of the purchase-money. The sale to the claimant cannot become absolute until it has been confirmed, and until it has become absolute he cannot maintain a suit for possession. If the claimant has fulfilled the conditions of sale, and his right is clear, the Court executing the decree is bound to give effect to the right. 6 N. W. P., H. C. Rep., p. 272.

**(32) Decree—Purchase-money—Deposit—Pre-emption—Execution.**

When a person obtained a decree declaring him entitled to the right of pre-emption with regard to certain lands, and ordering the payment of the purchase-money within the period of one month, and he paid the money into Court as a deposit until mutation of names had been effected. *Held*, that although the petition with which the money was tendered asked that it might be deposited and paid to the judg-



ment-debtor after mutation of names, yet it could not be said that the tender and deposit were saddled with a condition precluding the payment of the money before such mutation, and that the terms of the decree had been satisfied. 6 N. W. P., H. C. Rep., 46.

(83) *Conditional Decree "Final" judgment and decree.*

The Court granting a decree to the plaintiff in a pre-emption suit is competent to grant the decree subject to the payment of the purchase-money within a fixed period, and if the decree-holder fails to comply with the condition imposed on him by the decree, he loses the benefit of the decree. *Sheo Parsaud Lall vs. Thakoor Rai.* (H. C. R., N. W. P., 1868, p. 254) approved.—When a direction contained in a decree referred to the time at which such decree should become "final," held, (the case being one in which a special appeal lay,) that such decree does not become final on being affirmed by the lower appellate Court, but on the expiry of the period of special appeal, or, where such an appeal was instituted, when the decision of the lower appellate Court was affirmed by the High Court. I. L. R., 1 All., 132.

(34) *Minor—Legal Disability—Limitation—Act IX. of 1871, s. 7, and sch. II., cl. 10.*

The provisions of s. 7, Act IX. of 1871, are applicable in computing the period of limitation in suits to enforce a right of pre-emption. Where a condition for pre-emption contained in a record of rights was intended to take effect at the time of a sale and its language implied that the co-sharers in whose favor it was made were to be persons who were competent at that time to make a binding contract to accept or refuse an offer, no right of pre-emption accrued under the condition to a co-sharer who was a minor at the time of sale and unrepresented by any person competent to conclude a binding contract on his behalf, whether it was assumed that the condition arose out of special contract or general usage. *Nanoo vs. Tirka* (S. D. A. Rep., N. W. P., 1865, p. 97) observed upon.—Remarks on the right of pre-emption existing in villages in the North Western Provinces. *Raja Ram vs. Bana*. I. L. R., 1 All., 207.

(35) *Amendment of Plaint—Raising new issue—Pre-emption.*

Where a plaintiff claimed in his plaint a right of pre-emption as co-partner of the vendor—held, that he could not be entitled to a decree on the ground of vicinage. 1 B. L. R., Short Notes, 12.

## PRINCIPLES OF THE INDIAN PENAL CODE.

*[As explained by the original framers and laid before the Governor General of India in Council in the year 1837.]*

NOTE B.—(concluded.)

*In continuation of page 76.*

## ON THE CHAPTER OF GENERAL EXCEPTIONS.

We considered whether it would be desirable to make any distinction between offences committed against freemen and offences committed against slaves. We certainly entered on the consideration of this important question with a strong leaning to the opinion that no such distinction ought to be made. We thought it our duty however not to come to a decision without obtaining information and advice from those who were best qualified to give it. We have collected information on the subject from every part of India, and we have now in our office a large collection of documents containing much that is curious, and that in future stages of the work in which we are engaged will be useful. At present we have only to consider the subject with reference to the Penal Code.

These documents have satisfied us that there is at present no law whatever defining the extent of the power of a master over his slaves, that every thing depends on the disposition of the particular functionary who happens to be in charge of a district, and that functionaries who are in charge of contiguous districts or who have at different times been in charge of the same district hold diametrically opposite opinions as to what their official duty requires. Nor is this discrepancy found only in the proceedings of subordinate Courts. The Court of Nizamut Adawlut at Fort William lay down the law thus—"A master would not be punished, the Court opine, for inflicting a slight correction on his legal slave such as a tutor would be justified in inflicting on a scholar, or a father on a child." The Court of Nizamut Adawlut at Allahabad take a quite different view of the law. "Although," they say, "the Mahomedan Law permits the master to correct his slave with moderation, the Code by which the Magistrates and other criminal authorities are bound to regulate their proceedings does not recognize any such power, and as the Regulations of the Government draw no distinction between the slave and the freeman in criminal matters, but place them both on a level, it is the practice of the Courts, following the principles of equal

justice, to treat them both alike." The Court of Foujdarry Adawlut at Madras state that it is not the practice of the Courts to make any distinction whatever in cases which come before them, that a Circular Order of the Foujdarry Adawlut recognizes the right of a master to inflict corrections in certain cases, but that in practice no such distinction is made. We own that we entertain some doubts whether the practice be universally such as is supposed by the Foujdarry Adawlut. We perceive that two Magistrates in the Western Division of the Madras Presidency differ from each other in opinion on this subject. The Magistrate of Canara says that "the right of the master to inflict punishment has been allowed, but only to a very small extent." The Magistrate of Malabar states that "the relation of a master and slave has never been recognized as justifying acts which would otherwise be punishable, or as constituting a ground for mitigation of punishment." The Court of Foujdarry Adawlut at Bombay has given no opinion on the point, and there is a great difference of opinion among the subordinate authorities in the Bombay Presidency. One gentleman conceives that the imposing of personal restraint is the only act otherwise punishable which the Courts would allow a master to commit when a slave might be concerned. Another conceives that a master has a power of correction similar to that of a father. A third goes further and is of opinion that "all but cases of very aggravated nature would be considered as entitled to exemption from or mitigation of punishment on this account." On the other hand several gentlemen are of opinion that the relation of master and slave would not be considered by the Courts as a plea for any act which would be an offence if committed against a freeman.

It is clear therefore that we find the law in a state of utter uncertainty. It is equally clear that we cannot leave it in that state. We must either withdraw from a large class of slaves a protection to which the Courts under the jurisdiction of which they live now think them entitled, or we must extend to a large class a protection greater than what they actually enjoy.

We have not the smallest hesitation in recommending to his Lordship in Council that the law throughout all British India should be conformable to what in the opinion of the Court of Nizamut Adawlut at Allahabad is now actually the law in the Presidency of Fort William, and to what in opinion of the Court of Foujdarry Adawlut at Fort St. George is now actually the practice in the Madras Presidency. That is to say, we recommend that no act falling under the definition of an offence should be

exempted from punishment because it is committed by a master against a slave.

The distinction which in the opinion of many respectable functionaries the law now makes between acts committed against a freeman and acts committed against a slave is in itself an evil, and an evil so great that nothing but the strongest necessity, proved by the strongest evidence, could justify any Government in maintaining it. We conceive that the circumstances which we have already stated are sufficient to shew that no such necessity exists. By removing all doubt on the subject, we shall not deprive the master of a power the right to which has never been questioned, but of a power which is and has for some time been, to say the least, of disputable legality, and which has been held by a very precarious tenure.

To leave the question undecided is impossible. To decide the question by putting any class of slaves in a worse situation than that in which they now are is a course which we cannot think of recommending, and which we are certain that the Government will not adopt. The inference seems to be that the question ought to be decided by declaring that whatever is an offence when committed against a freeman shall be also an offence when committed against a slave.

It may perhaps be thought that by framing the law in this manner we do in fact virtually abolish slavery in British India; and undoubtedly, if the law as we have framed it should be really carried into full effect, it will at once deprive slavery of those evils which are its essence, and will insure the speedy and natural extinction of the whole system. The essence of slavery, the circumstance which makes slavery the worst of all social evils, is not in our opinion this, that the master has a legal right to certain services from the slave but this, that the master has a legal right to enforce the performance of those services without having recourse to the tribunals. He is a judge in his own cause. He is armed with the powers of a Magistrate for the protection of his own private interest against the person who owes him service. Every other Judge quits the bench as soon as his own cause is called on. The judicial authority of the master begins and ends with cases in which he has a direct stake. The moment that a master is really deprived of this authority, the moment that his right to service really becomes, like his right to money which he has lent, a mere civil right which he can enforce only by a civil action, the peculiarly odious and malignant evils of slavery disappear at once. The name of slavery may be retained: but the thing

is no longer the same. It is evidently impossible that any master can really obtain efficient service from unwilling labourers by means of prosecution before the Civil tribunals. Nor is there any instance of any country in which the relation of master and servant is maintained by means of such actions. In some states of society the labourer works because the master inflicts instant correction whenever there is any disobedience or slackness. In a different state of society the people labour for a master because the master makes it worth their while. Practically we believe it will be found that there is no third way. A labourer who has neither the motive of the freeman nor that of the slave, who is actuated neither by the hope of wages nor by the dread of stripes, will not work at all. The master may indeed, if he chooses, go before the tribunals, and obtain a decree. But scarcely any master would think it worth while to do so, and scarcely any labourer would be spurred to constant and vigorous exertion by the dread of such a legal proceeding. In fact we are not even able to form to ourselves the idea of a society in which the working classes should have no other motives to industry than the dread of prosecution. We understand how the planter of Mauritius formerly induced his negroes to work. He applied the lash if they loitered. We understand how our grooms and bearers are induced to work at Calcutta. They are gainers by working, and by obtaining a good character: they are losers by being turned away. But in what other way servants can be induced to work, we do not understand.

It appears to us therefore that if we can really prevent the master from exacting service by the use of any violence, or restrain, or by the infliction of any bodily hurt, one of two effects will inevitably follow. Either the master will obtain no service at all, or he will find himself under the necessity of obtaining it by making it a source of advantage to the labourer as well as to himself. A labourer who knows that if he idles his master will not dare to strike him, that if he absconds his master will not dare to confine him, that his master can enforce a claim to service only by taking more trouble, losing more time, and spending more money than the service is worth, will not work for fear. It follows that if the master wishes the labourer to work at all, the master must have recourse to different motives, to the motives of a freeman, to the hope of reward, to the sense of reciprocal benefit. Names are of no consequence. It matters nothing whether the labourer be or be not called a slave. All that is of real moment is that he should work from the motives and feelings of the freeman.

This effect, we are satisfied, would follow if outrages offered to slaves were really punished exactly as outrages offered to freemen are punished. But we are far indeed from thinking that by merely framing the law as we have framed it, we shall produce this effect. It is quite certain that slaves are at present often oppressed by their masters in districts where the Magistrates and Judges conceive that the law now is what we propose that it shall henceforth be. It is therefore evident that they may continue to be oppressed by their masters when the law has been made perfectly clear. To an ignorant labourer, accustomed from his birth to obey a superior for daily food, to submit without resistance to the cruelty and tyranny of that superior, perhaps to be transferred, like a horse or a sheep, from one superior to another, neither the law which we now propose, nor any other law will of itself give freedom. It is of little use to direct the Judge to punish, unless we can teach the sufferer to complain.

We have thought it right to state this, lest we should mislead his Lordship in Council into an opinion that the law, framed as we propose to frame it, will really remove all the evils of slavery, and that nothing more will remain to be done. So far are we from thinking that the law as we propose to frame it will of itself effect a great practical change, that we greatly doubt where even a law abolishing slavery would of itself effect any great practical change. Our belief is that even if slavery were expressly abolished, it might and would in some parts of India still continue to exist in practice. We trust, therefore, that his Lordship in Council will not consider the measure which we now recommend as of itself sufficient to accomplish the benevolent ends of the British Legislature, and relieve the Indian Government from its obligation to watch over the interests of the slave population.

## CALCUTTA HIGH COURT.

June, 1878.

PRESENT:

The Hon'ble Mr. Justice Ainslie and the Hon'ble Mr. Justice Sewell-White.

G. O. BEEBY and others,

versus

THE CHAIRMAN OF THE CALCUTTA MUNICIPALITY and others.

*S. 39 of Act IV. B. C. of 1877—Municipal Commissioners—Their liability to be prosecuted under the Penal Code.*

The protection given to public servants by s. 39 of Act IV. of 1877 does not extend to a Municipal Corporation prosecuted under the Indian Penal Code.

Messrs. Branson and Phillips for the complainants.

Mr. Piffard for the accused.

This was a reference to the High Court under the Presidency Magistrate's Act, as to whether Section 39 of Act IV. B. C. of 1876 was a bar to a prosecution of the Calcutta Municipality for a nuisance, without the previous sanction of Government.

The judgment of the Court was as under:—

AINSLIE, J.—The question referred by the Presidency Magistrate is whether the protection extended by Section 39 of Act IV. of 1877 to certain individual public servants, extends equally to a Municipal Corporation prosecuted under the Indian Penal Code for being guilty of a public nuisance.

By Section 11 of the Penal Code, the word "person" is defined to include a body of persons, whether incorporated or not, and therefore the word person in Section 21 may be read as a body of persons incorporated. The words "public servant" in that section may consequently denote a body of persons incorporated falling under any of the descriptions given therein. It is not necessary to refer to any except the 10th. The illustration in the 10th description says, that a Municipal Commissioner is a public servant, and it does not therefore follow that a corporation, such as that created by Act IV. of 1876 B. C. is also a public servant within the meaning of that section.

The words "every officer" in the 10th clause seem rather to point to an individual than to an incorporated body; but assuming for the

purposes of this reference that the Municipal Corporation of Calcutta is a public servant within the meaning of Section 21 of the Penal Code, still it seems to me that it does not come within the provisions of section 39 of the Presidency Magistrate's Act. By that Act no such Judge or public servant, as is described in that section, shall, unless with the previous sanction of Government, be prosecuted for any act purporting to be done by him in the discharge of his duty. The class of public servants referred to consists of those who are "not removable from office without the sanction of Government." It appears to me that this description must be read in its entirety, and that the words "not removable from office" cannot be separated from the following words "without the sanction of Government."

But if the whole be read as describing the class exempted from prosecution, except with the previous sanction of Government, the description can only be applied to a class not removable from office at all, by dropping the words "without the sanction of Government" which have no meaning as applied to such public servants.

The right to prosecute any person, or body of persons, by whom one may have been injured, is a common right which can only be limited by special legislation; and in considering whether the right has been taken away, we must see that it is taken away by express words, or by necessary implication. It does not seem to me that it must necessarily be implied that by the words "not removable from office without the sanction of Government" it was the intention of the Legislature to include those who are not removable from office under any circumstance at all.

I see no reason to suppose that the Government must have meant to extend the same protection to a body such as the Municipal Corporation of Calcutta, which cannot be taken under a warrant, or sentenced to imprisonment, which it thought fit to extend to certain individuals in the service of that Corporation, who no doubt are protected by Section 32 of the Calcutta Municipal Act, and Section 39 of the Presidency Magistrate's Act.

The answer which I would therefore give to the question referred to us by the Magistrate, is that the protection does not extend to a Municipal Corporation prosecuted under the Indian Penal Code.

WHITE, J.—I am of the same opinion.

The question submitted to us by the Presidency Magistrate, turns entirely upon the meaning and true construction of Section 39 of the Presidency Magistrate's Act.



It is not disputed, nor could it be disputed, that unless that section applies to the Corporation of the town of Calcutta, it is liable under the Penal Code to be prosecuted for a nuisance in the same way as if the offence had been committed by an ordinary individual. A Corporation may be proceeded against criminally, as well for a misfeasance as for a nonfeasance—*Reg. vs. The Birmingham and Gloucester Railway Co.* (3 Queen's Bench Rept., p. 223;) *Reg. vs. Scott.* (3 Ditto, p. 547) ; and *Reg. vs. The Great North of England Railway Co.* (9 Ditto 315.)

Section 39, as regards "a Judge, or any public servant not removable from office without the sanction of the Government," exempts them from prosecution for an offence, except with the previous sanction of the Government. The word "Government," as used in the section, means the Government acting in its executive capacity. It is contended that the Calcutta Corporation falls within the category of a public servant, not removable without the sanction of the Government. I think it is open to much doubts whether the Corporation, as distinct from its individual members, is a public servant at all, as these words are defined by the 21st Section of the Penal Code, which is incorporated with the 39th Section of the Act under consideration. Assuming, however, for the purpose of the argument, that that point is decided in favour of the defendant's contention, it seems to me clear that the Calcutta Corporation does not come within the description of a public servant irremovable from office without the sanction of Government.

The Corporation is created by Act IV. of 1876 B. C. By the 4th Section of that Act, certain persons to the number of 72, who are styled Commissioners, and of whom 48 are elected by the rate-payers, and 24 appointed by the Government, are incorporated by the name of the Corporation of the town of Calcutta. The Corporation is to have perpetual succession, a common seal, and by its corporate name to sue and be sued. There is no provision in the Act for putting an end to the Corporation, or for removing or dismissing it, either with or without the sanction of Government, which means, as I have said, the Executive Government. It can only cease to exist by an act of the Legislature, and until and unless the Legislature interferes, its corporate life must continue. The words "public servant not removable without the sanction of Government" are wholly inappropriate to describe the legal position of such a Corporation.

Again, if it were necessary to go beyond the Corporation and consider the position of the 72 members comprising it, they appear to be

equally without the particular description of public servant mentioned in Section 39 of the Presidency Magistrate's Act.

By Section 22, they are elected for a term of three years, and continue in office during that term. Section 23 enumerates the circumstances under which, and the only circumstances under which they cease to be members of the Corporation. These circumstances are death, resignation or disqualification, the disqualification being that which may arise from their becoming bankrupt, or interested in a contract with the Corporation, or being absent from Calcutta for six consecutive months, or being sentenced to a term of imprisonment. So that looking behind the Corporation, if I may so say, to the members who constitute it, it cannot be said of them, any more than of the Corporation, that they are persons who are not removeable without the sanction of Government.

Mr. Piffard has argued that the words in Section 39, which we are now considering, are intended to embrace two classes of public servants : 1st, those who are not removable from office at all ; and secondly, those who are removable only with the sanction of Government. But I am unable to agree with him that that is the true construction of the words in question. They appear to me to point to one class and one class only of public servants, *viz.*, that class which is removable only with the sanction of Government. The words are satisfied by applying them to that class, and whereas here a privilege is created in favor of certain persons, the meaning of the words creating the privilege should not be extended beyond their plain and natural sense. Mr. Piffard's contention would require us to construe the section as if its language had been " any public servant not removable from his office, or if removable not removable without the sanction of Government."

In fact, to warrant the construction contended for, some additional words have to be introduced, and this circumstance, I think, is fatal to the argument.

I agree with my brother Ainslie that, if we look to the reason of the privilege conferred by the 39th Section, there is a marked distinction between the case of a public servant, whose removal required the sanction of Government, and that of a Corporation in the position of the Calcutta Municipality. The Government may have an interest in protecting the former from prosecution without their previous sanction, but no interest in protecting the latter from the consequences of their own acts. Moreover, the Corporation, if convicted, cannot be punished by imprisonment, but only by fine. The Legislature

must have thought it a matter of importance that no public servant, where removal requires the sanction of Government, should be subjected to imprisonment without its sanction, but the same reasons for requiring Government sanction do not apply when the result would be merely the infliction of a fine which must ultimately be paid by the rate-payers of the town of Calcutta.

I concur, therefore, in the opinion that the question which has been submitted to us by the Presidency Magistrate must be answered in the negative.

## CALCUTTA HIGH COURT.

*The 22nd May, 1878.*

PRESENT :

The Hon'ble R. O. Mitter and the Hon'ble A. T. Maclean, *Justices.*

THE EMPRESS, *vs.* F. McL. CARTER.

*Sec. 186 of the Penal Code—Obstructing a public Officer—S. 79 of the Penal Code.*

The right of refusing admittance to a stranger into a house in a garden, the private property of an individual, is undoubtedly possessed by the owner, or the person in charge of it on behalf of the owner. This right can be curtailed or taken away only by a legislative enactment.

Mr. M. M. Ghose for the Petitioner.

The Junior Legal Remembrancer in support of the Conviction.

MACLEAN, J.—F. McL Carter having been convicted and fined Rs. 75 under Section 186 of the Penal Code, after a summary trial before Mr. Targiter, Assistant Magistrate, and J. P.; has petitioned this Court alternatively under Section 79 of the Criminal Procedure Code by way of appeal, or, under Section 297 of the same Code, by way of application for revision.

Beyond the fact that the Assistant Magistrate signed himself Justice of the Peace, there is nothing to show that F. McL Carter, if he is a European British subject, claimed to be dealt with as such, or that the Assistant Magistrate asked him whether he was one or not (Section 84, Criminal Procedure Code). In his petition, to which a pleader's signature is attached, he says that he is one; but the question is only relevant as deciding under what section of the Code this Court's jurisdiction is to be exercised.

The facts are shortly these: Carter is manager of a tea garden in the Chittagong district, and on the morning of the 22nd March the District Collector informed him by letter that he proposed to inspect his, Carter's, garden that morning under orders from Government; Carter replied by letter, asking for a copy of the instruction under which the Collector was acting. Shortly afterwards, the Collector, who had received Carter's letter while on his way to the garden, arrived, and Carter, as he now states, respectfully expressed his inability to allow the said Mr. Currie to inspect the garden unless he shewed your petitioner his authority to do so."

For thus obstructing the Collector in the discharge of his public functions Carter has been fined under Section 186 of the Penal Code and has brought the case before us. Before we can say that Carter has committed the offence for which he has been fined, we must be satisfied that the Collector was really discharging his public functions, and that Carter, knowing this, voluntarily obstructed him.

It is contended that the Collector acted under certain instructions from Government, and we will assume that it was part of these instructions that he should visit the different tea gardens in the district and inspect the labourers there.

At the date of this occurrence, 22nd March, it is not disputed that there was no law applicable to Chittagong, authorising the public officers to inspect tea gardens. If any such law now exists, it is Act VII. of 1873, B. C., which came into operation in Chittagong on 27th March by the publication on that date of Act II. of 1878, B. C., in the *Gazette*.

Assuming, however, that one of the Collector's functions under Government orders was to inspect the labourers on Carter's tea garden, it is not shewn that Carter was cognisant of these instructions. It is admitted in the Magistrate's decision that no information was given to the planters of the quarterly inspection prescribed by Government in the instructions under which the Collector acted, and it is not stated that the Collector shewed his authority to Carter on the morning of 22nd March. We cannot, therefore, hold that Carter knew that it was one of the Collector's public functions to inspect his garden on that date, or that, in refusing to allow an inspection, without production of authority, he committed any offence in law.

The argument that, because Carter allowed a former Collector under protest, to hold an inspection, he thereby subjected himself to

ture inspections, will not hold good. We think that the conviction is bad, and under Section 297, Criminal Procedure Code, we set aside the order of the Assistant Magistrate, and direct that the fine, if realized, be refunded.

*Note.*—My attention has been drawn since delivering the above to the fact that Mr. Currie was acting in his magisterial and not collectorate capacity on 22nd March. The Assistant Magistrate and J. P. was therefore not correct in his finding that the Collector was obstructed.

MITCHELL, J.—I am also of the opinion that the conviction is bad.

The petitioner has been convicted under Section 186 of the Penal Code. It is not disputed that he voluntarily obstructed the Collector of Chittagong in inspecting the tea garden in his charge. But still it is necessary for the prosecution to establish that the Collector demanded the inspection in the discharge of his public functions. This has not been done.

But assuming that it has been established that there was a Government letter authorising the Collector to inspect the tea garden in Chittagong, still the obstruction of the petitioner would not be an offence by reason of the provisions of Section 79 of the Penal Code. Section 79 provides that "nothing is an offence which is done by any person *who is justified by law*, or who, by reason of a mistake of fact, and not by reason of a mistake of law, in good faith believes himself to be justified by law in doing it."

In this case I think Mr. Carter was justified by law in refusing to allow the Collector to inspect the garden. The right of refusing admittance to a stranger into a house in a garden, the private property of an individual, is undoubtedly possessed by the owner, or the person in charge of it on behalf of the owner. This right can be curtailed or taken away only by a legislative enactment. In this case it is admitted that the law authorising the Collector to inspect the tea garden in Chittagong was not in force on the 22nd March last, when the petitioner is alleged to have refused the inspection of his garden to the Collector. Therefore, assuming that all the facts upon which the prosecution in this case is based have been established, I think the petitioner was justified by law in refusing to allow the Collector to inspect his garden. I am therefore of opinion that by reason of the general exception contained in Section 79 of the Indian Penal Code, the petitioner's act does not amount to an offence. The conviction, therefore, must be set aside, and the fine if realized must be refunded.

## HIGH COURT, N. W. P.

*The 7th December, 1877.*

PRESENT :

Mr Justice Pearson and Mr Justice Turner.

EMPRESS OF INDIA, *versus* SALIK.\**Act XLV. of 1860 (Indian Penal Code), s. 211—False Charge.*

To constitute the offence of making a false charge, under s 211 of the Indian Penal Code, it is enough that the false charge is made and that the charge is not pending at the time of the offender's trial. *The Queen v Subbanna Gaundun* followed.

This was an appeal to the High Court by the Local Government, against a judgment of acquittal passed by Mr. J. W. Power, Sessions Judge of Ghazipur, dated the 8th September, 1877, reversing a judgment of conviction passed by Mr. A. E. C. Casey, Assistant Magistrate of the first class, dated the 1st August, 1877.

As this case merely follows *Reg. v. Subbanna Gaundun* already followed in *Empress of India v. Abul Hasan*,† it is not reported in detail.

## HIGH COURT, N. W. P.

*The 15th December, 1877.*

PRESENT.

Sir Robert Stuart, Kt., Chief Justice, and Mr Justice Spankie.

EMPRESS OF INDIA, *versus* KAMPTA PRASAD.‡

*Public Servant—Illegal gratification—Acceptance of present—Act XLV. of 1860 (Indian Penal Code), ss. 161, 165.*

K, a police-officer, employed in a Criminal Court to read the diaries of cases investigated by the police and to bring up in order each case for trial with the accused and witnesses, after a case of theft had been decided by the Court in which the persons accused were convicted, and a sum of money, the proceeds of the theft, had been made over by the order of the Court to the prosecutor in the case, asked for and received from the prosecutor a portion of such money, not as a motive or reward for any of the objects described in s 161 of the Indian Penal Code, but as "*dasturi*." Held that K was not, under these circumstances, punishable under s. 161 of the Indian Penal Code, but under s. 165 of that Code.

Kampta Prasad, a police-officer, was employed in the Court of a Magistrate to read the diaries of cases investigated by the police and to

\* *Vide* I L R., 1, All., p. 527.† *Vide* p. 218.‡ *Vide* I. L. R., 1, All., p. 580.

bring up in order each case for trial with the accused and witnesses. On a certain day he brought up, in the usual manner, a case in which one Chattra charged two persons with the offence of theft. These persons were convicted and sentenced, and a sum of money, some Rs. 3, the proceeds of the theft, was, by the order of the Magistrate, made over to Chattra, the prosecutor in the case, who then left the court-house. Immediately after his departure Kampta Prasad also left the court-house, without orders, there being no reason why he should have left it, and it subsequently transpired that he had asked Chattra for and had received from him a portion of the money made over to Chattra by the Magistrate. On these facts the Magistrate of the District convicted Kampta Prasad of an offence under s. 161 of the Indian Penal Code. On appeal by Kampta Prasad the conviction was set aside by the Sessions Judge, who observed as follows: "I think there is no reasonable doubt that the appellant took a small gratification of one rupee from a plaintiff in a criminal case. There is, however, no evidence whatever produced which proves or makes it even very probable that this gratification was given with any of the objects mentioned in s. 161 of the Indian Penal Code, under which section the appellant has been punished. The payment was made probably exactly as described by the giver, '*dasturi*,' that is, a customary payment made to a person clothed with a little brief authority irrespective of any return or consideration for the payment. Such an offence is probably punishable under s. 29 of Act V. of 1861, and in this view of the case I alter the finding of the lower Court and modify its sentence, and order Kampta Prasad to be imprisoned under s. 29 of Act V. of 1861 for one month from the 10th September last."

The case was reported for the orders of the High Court.

FRANKIE, J.—The Sessions Judge appears to me to be right in his view of this case in so far as it is affected by s. 161 of the Indian Penal Code. Under the terms of s. 161 of the Penal Code the gratification must be taken by a public servant as a motive or reward for doing or forbearing to do any official act, or for showing, or forbearing to show in the exercise of his official functions, favour or disfavour to any person, &c., &c. But it is not pretended here that the one rupee paid to the accused was given to him as a motive or reward for any official act, or for showing or forbearing favour or disfavour in the exercise of his official acts. There was no agreement between the parties and indeed no previous connection. The accused was the person attached to the Deputy Magistrate's Court to bring up police cases for trial. He is the

police clerk in the Magistrate's office, and he was not the police-officer who sent in the case nor connected with the police-inquiry. The party who gave the rupee himself stated that it was asked for and taken as "*dasturi*," after the case had terminated and the accused persons had been convicted. The giver of the rupee had been the original prosecutor. It seems to me that the section requires that the gratification should be taken with the view of doing or forbearing to do an official act, or for showing or forbearing to show favour or disfavour in the exercise of official functions. It is not taken after the act has been done, and without some previous understanding. I do not find evidence in this case that the money was promised and given as a reward for the accused's performance of his duty in Court.

It appears to me that s. 165 more nearly applies, and that as the accused was the subordinate of the Deputy Magistrate who had tried and closed the case, and asked for a reward, the one rupee, after the case was over, he is guilty of accepting. "a valuable thing," and without reference to any particular motive or reward for doing or forbearing to do an official act. However, I am desirous that the record should go before a Bench, or that it should be heard before myself and another Judge, as the Hon'ble Chief Justice may direct. I therefore send the case to the Registrar in order that it may be laid before the Hon'ble Chief Justice.

STUART, C. J.—In accordance with Mr. Justice Spankie's suggestion I directed this case to be brought before the first Bench of the Court, consisting of Mr. Justice Spankie and myself, and the case has been attentively considered by me.

I believe that Mr. Justice Spankie remains of the opinion expressed in the note issued by him previously to the case being brought before us, and I quite agree with him that s. 161 of the Penal Code has no application to the facts, and I must express my surprise that the Officiating Magistrate should have so misconceived the law. The motive or reward explained in s. 161 has obviously no application whatever to such a case as this. But, on the other hand, I scarcely think that the one rupee which was given by, or possibly extorted from, Chattrā, can be regarded as in the nature of "*dasturi*." It appears to me to be too considerable for that, for it was nearly one-third of the whole sum recovered by Chattrā. "*Dasturi*" is a customary payment very much less. It varies I believe throughout India from two to four pice on the rupee, and therefore *dasturi* in the present case should not have exceed-



ed two annas, if it was proper for Kampta, the policeman, to accept anything of the kind, which I do not think it was. Probably the offence might come under s. 29 of the Police Act, Act V. of 1861, for in taking the rupee Kampta appears to have clearly violated the Police instructions—see these on “gratifications.”

But I also agree with Mr. Justice Spankie that such a case as this is covered by the terms of s. 165 of the Penal Code. The only question is whether the rupee here was a “valuable thing” within the meaning of that section. The value must I think be looked at with reference to the proportion it bears to the money or property of which it forms part, and here the rupee was rather less than a third of the whole sum obtained by Chattrra from the Criminal Court. I therefore consider that in lieu of the conviction before the Judge, and of the sentence passed by him, Kampta may be convicted under s. 165 of the Penal Code, and that he should suffer four months’ simple imprisonment. I would also order him to pay a fine of one rupee, and in default to suffer one month’s additional imprisonment, such additional imprisonment to cease when the fine is paid or is recovered by process of law.

SPANKIE, J.—I concur with the Hon’ble Chief Justice on the propriety of the conviction under s. 165, and in the sentence proposed. The conviction of accused and sentence passed by the Sessions Judge under s. 29 of Act V. of 1861 is annulled, and the prisoner is convicted under s. 165 of the Indian Penal Code, and a warrant must issue accordingly.

## HIGH COURT, N. W. P.

*The 15th December, 1877.*

### PRESENT:

Mr. Justice Spankie.

MUTHRA\* vs JAWAHIR and others.

*Public Ferry—Act XLV. of 1860 (Indian Penal Code), ss. 188, 441—Criminal Trespass—Regulation VI. of 1819, s. 6—Disobedience to order duly promulgated by Public Servant—Act VIII. of 1851.*

A person plying a boat for hire at a distance of three miles from a public ferry cannot be said, with reference to such ferry, to commit “criminal trespass,” within the meaning of that term in s. 441 of the Indian Penal Code.

If, when directed by the order of a public servant, duly promulgated to him, to abstain from plying a boat for hire at or in the immediate vicinity of a public ferry, a person disobeys such direction, he renders himself liable to punishment under the Indian Penal Code.

**SPANKIE, J.**—I am not prepared to say that the Joint Magistrate has improperly acquitted the accused, who was charged with criminal trespass. This offence is defined in s. 441 of the Indian Penal Code as follows: "Whoever enters into or upon property in the possession of another, with intent to commit an offence (offence denotes a thing made punishable by the Penal Code), or to intimidate, insult, or annoy any person in possession of such property; or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence, is said to commit criminal trespass." From the statement of the Officiating Magistrate of the District it would appear that the criminal trespass charged consisted in accused plying a boat for hire on the Jumna, three miles to the north-west of the public ferry at Barah, which had been leased to the complainant. Mr. Carter, the Joint Magistrate, considers that no offence as defined in s. 441 of the Penal Code was committed, and looking at the terms of the section and the admitted fact that the accused had plied the boat at a distance of *three* miles from complainant's ferry, I concur with Mr. Carter's view of the case.

S. 6, Regulation VI. of 1819, prohibits all persons from employing a ferry-boat plying for hire at or in the *immediate vicinity* of public ferries without the previous sanction of the Magistrate. If, in the case of a prohibition distinctly made known to a person, he continued to ply a boat for hire at or in the immediate vicinity of a public ferry, the Magistrate doubtless is empowered by the Penal Code to punish him for his disobedience of such order.

Act VIII. of 1851 enables the Government to levy tolls on public roads and bridges, and s. 6 relates to a distinct offence, defined in the section, committed against the person appointed to collect the toll at a public ferry or bridge, and also to the offence of unlawfully and extortionately demanding a higher rate of toll than that fixed by the schedule to the Act. It would hardly apply to the particular case before the Court ..... The Court, as at present advised, sees no ground for interference under s. 297 of the Criminal Procedure Code.

## HIGH COURT, N. W. P.

*The 9th November, 1877.*

## PRESENT :

Mr. Justice Turner and Mr. Justice Spankie.

EMPRESS OF INDIA, vs ABUL HASAN.\*

*Act XLV. of 1860 (Penal Code), s. 211—False Charge.*

To constitute the offence of making a false charge, under s. 211 of the Indian Penal Code, it is enough that the false charge is made though no prosecution is instituted thereon. *The Queen v. Subbanna Gaundan* followed. *The Queen v. Bishoo Barik* distinguished.

The High Court delivered the following

JUDGMENT.—In this case Abul Hasan went to the police-station and accused Ser Mal of having stolen certain surgical instruments from the dispensary at Atrauli. This complaint was made with the intention that it should be reported to the Magistrate and that thereon proceedings should be taken against Ser Mal. At the suggestion of Abul Hasan, the police immediately searched the premises occupied by Ser Mal, and there found, in a place which could be readily reached from the outside of the house, the articles alleged to have been stolen. The police, finding that Abul Hasan had recently a quarrel with Ser Mal about the non-payment of some fees for medical attendance, and seeing that the articles were placed in a spot unlikely to have been selected by the owner of the premises, but in which they might have being deposited by any person outside the house without attracting the attention of the inmates, in forwarding a report to the Magistrate intimated that the charge made was false. The Magistrate, after making a second inquiry through the tahsildar, came to the same conclusion and refrained from instituting any proceedings against Ser Mal. Abul Hasan was, however, summoned to answer the charge of having instituted a false complaint of a criminal offence, and on this charge he was convicted. On appeal the Judge acquitted him, holding that the charge of false complaint could not be sustained because the Magistrate had not inquired into the charge of theft, and in support of his judgment the Judge relied on the ruling of a Bench of the High Court, Calcutta—*The Queen v. Bishoo Barik*. We may point out that in that case proceedings on the original charge were actually pending when the charge of false complaint was instituted and determined, whereas in the case before us no proceedings were pending on the original charge when pro-

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\* *Vide* I. L. R., 1, All., p. 497.

ceedings were instituted against Abul Hasan. Whether it would be a sufficient answer to a charge of false complaint that the complaint had not been determined and that proceedings were still pending, we need not now determine, for in this case no proceedings had been instituted. The offence consists not in the prosecution of a false complaint but in the making of it. The case of *The Queen v. Subbanna Ganndan* is precisely in point. We concur in the ruling of Chief Justice Scotland in that case and in the grounds on which that ruling proceeds. The ground therefore on which the judgment of the Sessions Judge proceeds is bad in law. The evidence adduced by the prosecution satisfies us that the original charge was made and that it was false, and warrants the inference that Abul Hasan knew it was false, and made it with the intention of injuring Ser Mal. The conviction was therefore proper, and the sentence is certainly not too severe. The appeal is allowed, the judgment of acquittal passed by the Sessions Judge is set aside, and the conviction and sentence affirmed.

### MADRAS HIGH COURT.

*The 27th September, 1877.*

#### PRESENT :

Mr. Justice Innes, Offg. C. J., and Mr. Justice Busteed.

In the matter of SUBBA AITALA\* and another.

#### *Criminal Appeal—Presentation of.*

A petition of appeal in a Criminal case may be presented to the Appellate Court by any person authorized by the appellant to present it.

Upon reading a letter from the Sessions Judge of South Canara referring the Proceedings of the late Acting Head Assistant Magistrate of that district in Criminal Appeal No. 32 of 1876, Counsel not appearing, the High Court made the following

**RULING :—**In this case the Head Assistant Magistrate has rejected an appeal from a sentence of a 3rd-class Magistrate on the ground that the appeal was presented after the time prescribed in the Limitation Act (IX. of 1871), Schedule II., Article 152.

The judgment of the 3rd-class Magistrate was dated 11th July 1876. On the same date application was made for a copy and the copy was

\* *Vide* I. L. R., I. Mad., p. 304.

furnished on the 24th July, allowing for the delay incurred in granting a copy of the judgment the time for preferring an appeal expired on the 23rd August.

It appears from the order of the Head Assistant Magistrate (dated 26th October 1876) finally rejecting the appeal as barred by time that the appeal-petition was first presented on or about the 14th August, and that the Head Assistant Magistrate refused at that time to receive it on the ground that the person presenting it was not an authorized Pleader of any Court.

The appeal-petition was in time when presented on the 14th August, and the Head Assistant Magistrate was not justified in refusing to receive it on the ground that the person presenting it was not an authorized Pleader. The Code of Criminal Procedure affords no authority for the opinion that a petition of appeal may not be presented by any person authorized by the appellant to present it.

The order of the Head Assistant Magistrate rejecting the appeal is hereby annulled.

## MADRAS HIGH COURT.

*Proceedings,\* 2nd October, 1877.*

Before the Officiating Chief Justice (Mr. Justice Innes) and Mr. Justice Busteed.

IN THE MATTER OF—

*Criminal Procedure Code, Section 473—Construction.*

The prohibition in Section 473 of the Criminal Procedure Code (Act X. of 1872) is a personal prohibition

Upon reading a letter from the District Magistrate of the Kistna District, requesting orders as to the meaning of the word "Court" in Section 473 of the Criminal Procedure Code (Act X. of 1872), Counsel not appearing, the High Court made the following

**RULING :—**In this case a charge of using criminal force was preferred against a Police Inspector by a keeper of an arrack shop. The Head Assistant Magistrate, Mr. Sewell, inquired into the case and dismissed the charge as false.

On the application of the Police Inspector permission was granted by Mr. Sewell to the Police Inspector to prosecute the shopkeeper for an offence punishable under Section 211 of the Indian Penal Code. Pro-

\* *Vide I. L. R., I, Mad., p. 305.*

ceedings were thereupon instituted in the Court of the Head Assistant Magistrate, and Mr. Sewell began to inquire into the case but left before the completion of the trial. Mr. Moore, who succeeded Mr. Sewell, took up the inquiry, and finding that the case was not a case which should be committed to the Court of Session but one triable by a 1st Class Magistrate he submitted the Proceedings for the orders of the District Magistrate on the ground that the provisions of Section 473 of the Code of Criminal Procedure precluded him from trying an offence committed in contempt of the authority of his own Court. The case has been disposed of by being referred to the Joint Magistrate, but the District Magistrate requests for his future guidance to be informed whether the word "Court" in Section 473 is to be construed as referring to the office or to the person of the Magistrate or Judge before whom an offence of the class described in Section 473 of the Code is committed.

The High Court are of opinion that the prohibition in Section 473 is a personal prohibition, the mischief to be prevented being that the same person should not decide a matter which he may have already prejudged. The definition of the words "Criminal Court" in Section 4 of the Code of Criminal Procedure admits of this construction.

### CALCUTTA HIGH COURT.

*The 26th April and 3rd June, 1878.*

#### PRESENT :

The Hon'ble Sir Richard Garth, Kt, Chief Justice, and the Hon'ble Mr Justice McDonell, V. C.

BEHARI LALL SANDYAL (Petitioner) *Appellant*,

*versus*

JUGGO MOHUN GOSSAIN (Objector) *Respondent*.

*Application for probate of will—Question of title—Power to make will  
—Hindu Widow.*

As long as an application for probate of a will is made *bond fide*, it is not the province of the Court to go into questions of title with reference to the property of which the will purports to dispose. The grant of probate to the executor does not confer upon him any title to property which the testator had no right to dispose of. It only perfects the representative title of the executor to the property, which did belong to the testator, and over which he had a disposing power. There is no rule of law which forbids a Hindu widow to make a will of property, which belongs exclusively to herself. She cannot except for special purposes, alienate her husband's estate by will or otherwise, because she has only a life interest in it.

The Standing Counsel Mr. J. D. Bell, and Babu Troilokyanath Mitter for the appellant.

Messrs. Bianson and Phillips, instructed by Babu Opendro Chunder Ghose, for the respondent.

This was an appeal from a decision of Mr. H. T. Prinsep, the District Judge of Hooghly, refusing the grant of probate to the will of the late Kadumbini Dabi, and the facts of the case, so far as they are of any public interest, are sufficiently stated in the judgment of the Court, which was as under :—

GARTH, C. J.—The questions involved in this case are of great general importance; and having considered them carefully, we are of opinion that the view taken by the Judge in the Court below was erroneous.

The application was for probate of the will of Kadumbini Dabi, the widow of Nund Mohun Gossain, and it was made by Behari Lall Sandyal, the brother of the testatrix, who was the sole executor named in the will.

It was opposed by Juggo Mohun Gossain, the sole surviving brother of Nund Mohun, who denied in the first place that the will was genuine; and in the next place contended that the testatrix had no right to dispose of the property mentioned in the will inasmuch as she had only a life estate in it.

Two issues were raised in the Court below :

1st. Is the will the last will of the deceased, Kadumbini Dabi, and is Behari Lall Sandyal entitled to receive probate thereof as executor?

2nd. Was the deceased Kadumbini Dabi entitled to make a will disposing of the property that she inherited from her adopted son Nilmadhub Gossain, that is, property with accumulations, that he inherited from Nundo Mohun Gossain?

The Judge, upon the first issue, decided that the will was properly executed; and also that the executor had a right to probate, subject to the further question involved in the 2nd issue, whether the testatrix had any disposing power over the property therein mentioned.

It was objected on behalf of the petitioner, that the Judge ought not, in a proceeding of this kind, to have raised the question involved in the 2nd issue at all, but the Judge considered that as a Hindu widow has ordinarily no power to make a will, it was necessary for him, before he granted probate, to decide whether the property devised was such as the testatrix had a right to dispose of.

A good deal of evidence was accordingly gone into upon this point, and in the result the Judge decided that the testatrix had no power to dispose of the properties mentioned in the will inasmuch as they formed part of her husband's ancestral estate, and she had only a life interest in them.

He accordingly refused the application for probate, and against his decision this appeal has been preferred.

It has been argued for the appellant.

1st—That the question raised by the 2nd issue, was one which the Judge had no right to entertain in a proceeding of this nature; and

2ndly—That even if he had a right to decide whether the testatrix had any disposable property at all, there was sufficient evidence that she had some *Stridhun*, which would be quite enough to justify the grant of probate.

We do not think it expedient to enter upon the consideration of this latter point, because we do not wish to prejudice the rights of either party, in case of any future litigation upon that subject. It is sufficient for us to say that if it were necessary to establish that the lady had some *Stridhun* we think there is sufficient evidence of that fact to justify the grant of probate.

But it is not necessary, in our opinion, to enter upon these considerations because we think that upon an application for probate of a will as long as it is made *bond fide*, it is not the province of the Court to go into questions of title with reference to the property of which the will purports to dispose.

Since the passing of the Succession Act (Act X. of 1865) no executor can make title to any property of the testator, whether disposed of by the will or not, nor can he sue for or claim any such property, or even clothe himself with his representative character, for the purpose of collecting or paying debts, or otherwise legally intermeddling with the affairs of the testator, without first obtaining probate of the will.

Nor again can any person, who may be interested under the will (devisees, or others to whom the property is bequeathed) make any title, or attempt to enforce their right to it, unless probate of the will has first been obtained.

On the other hand, it is clear that the grant of probate to the executor does not confer upon him any title to property which the testatrix had no right to dispose of. It only perfects the representative title of the executor to the property, which did belong to the testator, and over which he had a disposing power.

Mr. Phillips endeavoured to make a distinction in the case of wills made by Hindu widows, upon the ground that, *prima facie*, they had no right to make a will, and this apparently was one of the considerations which influenced the Judge in the Court below. But there is no rule of law that we are aware of which forbids a Hindu widow to make a will of property, which belongs exclusively to herself. She cannot, except for special purposes, alienate her husband's estate by will or otherwise, because she has only a life interest in it. But she is



only like other persons in that respect; and the grant of probate to the executor in this case will not prejudice in any way the objector's rights, if the property really belonged to him, and not to the testatrix.

Mr Phillips also argued that under Section 240 of the Succession Act, the Judge had no right to grant probate, unless the testatrix in this case had a fixed place of abode, and some property, moveable or immoveable, within the jurisdiction of the District Court.

But this is really an objection to the jurisdiction of the Judge, and it was never raised in the Court below, and moreover, if it had been, it appears that the testatrix had a fixed abode at the time she died within the district.

We are of opinion, therefore, that the judgment of the Court below should be reserved, and that probate should be granted to the applicant in accordance with the petition.

### CALCUTTA HIGH COURT.

*The 25th and 26th February, and 15th April and 9th May, 1878.*

PRESENT :

The Hon'ble Sir Richard Garth Kt., Chief Justice, and the Hon'ble W. Markby and the Hon'ble R. C. Mitter, Justices.

\* JOY KRISTO COWAR (Defendant) *Appellant*,

*versus*

NITTYANUND NUNDY, (Plaintiff) *Respondent*.

*Ancestral trade—Minor's liability for debts on account of.*

The guardian of a Hindu minor is competent to carry on an ancestral trade on behalf of the minor. Consequently the minor is liable for the debts incurred on account of such trade. It is reasonable as well as in accordance with legal principles, that a minor, on whose behalf an ancestral business is carried on, ought not to be held personally liable for the debts incurred in that business. There must be some defined limit to the minor's liability. It should be in accordance with the principle contained in s. 247 of the Contract Act (IX. of 1872.)

Mr. Bonnerjee, instructed by Messrs. Swinhoe Law & Co., for appellant.

Messrs. Branson and Allen, instructed by Mr. Dover, for the respondent.

This was an appeal from a decision of Mr. Justice Macpherson decreeing the plaintiff's claim, and the facts of the case and the point of law involved sufficiently appear from the judgment of the Court which was delivered by

MARKBY, J.—It appears that Anundo Chunder Coowar, the father of the appellant, who is an infant, died on the 19th March 1871. Anundo Chunder up to the time of his death carried on business as a trader, and had dealings with the plaintiff's firm. He died, leaving him surviving the appellant and his elder brother, Nobokisto, both of

them infants under the age of 16 years, and two widows. The son and widows after Anundo's death lived as members of a joint Hindu family. The ancestral trade was carried on under the management of the widows.

The widows, being *purdanasheen* women, could not take the management of the ancestral trade directly into their own hands, but employed their son-in-law, one Harradhone, for that purpose, and it was under the direct supervision and management of Harradhone that the business was carried on. It is also proved that the appellant's elder brother, Nobokisto, after he came of age, took part in the management with his brother-in law, Harradhone.

During the sole management of Harradhone and also during the joint management of Nobokisto and Harradhone, dealings with the plaintiff's firm continued, and in the course of these transactions the defendants became indebted to the plaintiffs in the sum of Rs. 4,605-11-3.

This debt entirely arises out of transactions connected with the ancestral business carried on by the defendant's family after Anundo Chunder's death.

The plaintiffs brought a suit to recover the amount, and Mr Justice Macpherson has decreed the claim with this reservation, that the amount decreed is to be realized out of the property of the deceased's father, Anundo Chunder Cowar. Against this decree the infant, Joykisto, has alone appealed.

The questions that we have to determine are, whether the infant appellant is at all liable for this debt; and if so, to what extent? It seems to us that on the authority of decided cases (Petam Dass, Taylor's Reports, page 279; Ram Lall Thakoorsidoss v. Luchmj Chund, 1, Bombay High Court, Appendix, page 71; Joherun Bibee v. Sree Gopal Misser, 1, I. L. R., Calcutta Series, page 470), the guardian of a Hindu minor is competent to carry on an ancestral trade on behalf of the minor. Consequently the contention raised in this appeal, that the infant appellant is not liable to any extent for the debt in question, is not well founded.

On the other hand, it seems to us only reasonable as well as in accordance with legal principles, that a minor, on whose behalf an ancestral business is carried on, ought not to be held personally liable for the debts incurred in that business.

There must be some defined limit to the minor's liability.

The limit apparently laid down by Mr. Justice Macpherson is, that all the ancestral property is to be rendered liable. But there may be instances in which this limit would be found manifestly inadequate and unsuited to reach the justice of the case. For example, a petty trade in the time of an ancestor might expand after his death into a large flourishing business in the hands of a manager for infants. Debts arising out of this business would naturally become proportionately large; and it would seem unreasonable to hold that such debts should be recoverable from ancestral property only.

On the other hand, the trade might not prosper ; and in this case the minor ought not to be liable to account for trade losses out of any property, unconnected with the assets of the business, which he may have received from his ancestor.

In the case of a minor being admitted into partnership in the ordinary way, Section 247 of the Contract Act (IX. of 1872) provides, that for any "obligation of the firm the share of the minor in the property of the firm is alone liable."

We think that this limit of the infant's liability which has been adopted by the Legislature in the case of a minor being admitted by contract into a partnership business, ought to be adopted in such a case as the present. On principle there ought not to be any difference between the nature of the liability of an infant admitted by contract into a partnership business, and that of one on whose behalf an ancestral trade is carried on by a manager.

The elder brother, Nobokristo, has not appealed against Mr. Justice Macpherson's order, nor, on the other hand, have the plaintiffs appealed, upon the ground that Nobokristo should have been made personally liable in the ordinary way.

We ought not, under ordinary circumstances, to make a decree which would have the effect of altering his liability, when neither he nor the plaintiff have appealed against the decree in the Court below.

But under Section 337 of the Code of Civil Procedure, we are empowered, in a case like the present, to draw up what would be a fair decree as regards both defendants.

We propose, therefore, to make an order that, unless the defendants admit partnership assets sufficient for the payment of the debt, there should be the usual decree for an account of the partnership property, and a direction that the debts be paid out of that property.

It will be the duty of the plaintiffs to serve Nobo Kisto with a copy of this judgment ; and if, within three weeks from the date of Nobokristo receiving a copy of this judgment, neither the plaintiffs nor Nobo Kisto make any application to alter the terms of our proposed decree, the decree will be drawn up accordingly, but either party will be at liberty to appeal within that time.

The minor defendant is entitled to the costs of the appeal.

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# INDEX.

Page.

## A

ACCOMMODATION acceptor, ...	285
ACQUITTAL by Jury, conviction by High Court, ..	287
ACTS :—	
1858—XXXV., s. 9, ...	291
1859—VIII., s. 2, ...	257
„ „ s. 139, ...	292
„ „ s. 200, ...	294
„ „ s. 273—281, ...	288
„ XIV., ...	287
1868—I., s. 6, ...	288
1871—VI., s. 24, ...	293
„ VIII., s. 35, ...	284
„ IX., ...	287
„ „ sch. ii., art. 167, ...	295
1872—I., { s. 37, ...	286
„ { s. 92, ...	285
„ IX., ss. 23, 25, ...	292
„ „ s. 127, illust. c, ...	293
„ „ ss. 132, 134, 135, 139, ...	285
„ X., ss. 3 and 223—343, ...	288
„ „ s. 263, 457, ...	287
1873—XIX. s. 194, 195, ...	291
ADDITION to contract after signature, ...	286
ADVERSE possession, ...	286
ALTERATION of Contract, ...	286

## B

BENGAL Civil Courts' Act, s. 24, ...	293
--------------------------------------	-----

## C

CIVIL Procedure Code, ss. 2, 139, ...	292
„ „ s. 200, ...	294
CONDITIONAL sale, ...	294
CONJUGAL Rights, ...	291

	<i>Page.</i>
CONSIDERATION, ...	292
"    , want of, ...	293
"    , immoral, ...	292
CONSTRUCTION, ...	280, 288
"    , of a grant for an indefinite period, ...	280
CONTRACT Act, ss. 23, 25, ...	292
"    s. 127, illi st c, ...	293
"    • ss. 132, 134, 135, 139, ...	285
Do. Void, ...	293
CO-SHARER, ...	260
COURT of Wards, ...	291
CO-WIDOWS, ...	284
CREDITORS, trust deed for benefit of, ...	285
<b>D</b>	
DEMAND, ...	287
DISCHARGE of surety, ...	285
Do. from arrest, ...	288
DOWER, ...	293, 295
<b>E</b>	
ENHANCEMENT, ...	260
EQUITABLE Mortgage, ...	285
EVIDENCE Act, s. 92, ...	285
EXECUTION, ...	288
EXECUTION of decree, ...	294
<b>F</b>	
FINAL decree of Appellate Court, ...	295
FORECLOSURE, ...	294
FORFLIFURE, ...	294
<b>H</b>	
HINDU Joint Family, ...	273
HINDU Law, ...	286, 294
"    of succession, ...	284
"    Widow, ...	268, 294
<b>I</b>	
ILLEGITIMATE son, ...	287
IMMORAL consideration, ...	292
IMPRISONMENT for debt, ...	288
ISSUES, trial and determination, ...	292
<b>J</b>	
JUDGMENT-CREDITOR, ...	288
Do. DEUTOR, ...	283

# INDEX.

iii

Page.

## K

KABULEET, ... 260

## L

LIMITATION Act, sch. ii., art. 167, ... 295

LIMITATION, ... 286, 287

LUNATIC, ... 291

## M

MAINTENANCE, ... 268, 287

MORTGAGE, ... 294

„, Equitable, ... 285

MOTHER, share of, on partition among sons, ... 286

MUHAMMADAN Law, ... 293, 295

## N

NORTH-WESTERN Province's Land Revenue Act, ss. 194, 195, ... 291

## P

PARTICULAR Act, decree for performance of, ... 294

PARTITION, ... 286

„ among sons, share of mother on, ... 286

PERFORMANCE of a particular act, decree for, ... 294

PRINCIPAL and surety, ... 285

PRINCIPLES of the Penal Code.

*On Offences against the State,* ... 263

PROCEDURE, ... 288

## R

REGISTRATION Act, 1871, s. 35, ... 284

REGULATION XVII. of 1806, s. 8, ... 294

RENT, suit for, ... 257

RES-JUDICATA, ... 257, 292

RETROSPECTIVE enactment, ... 288

REVERSIONER, ... 294

## S

SALE, conditional, ... 294

SHARE of mother on partition among sons, ... 286

SPECIAL Appeal, ... 295

	<i>Page.</i>
STATE, offences against the ...	263
SUDRA, ...	287
SUIT, ...	287
SUIT for enhancement, ...	260
Do. Kabuleut, ...	260
Do. Rent, ...	257
SURETY-BOND, ...	293
SURETY, discharge of, ...	285
,, , eventual remedy of,...	285

## T

TITLE, ...	286
TRIAL and determination of issues, ...	292
TRUST deed for benefit of creditors, ...	285

## V

VOID Contract, ...	293
VOID Agreement, ...	292

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## CALCUTTA HIGH COURT.

*The 12th September, 1877.*

FULL BENCH.

Before Sir Richard Garth, Kt, Chief Justice, Mr. Justice Jackson, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

GOBIND CHUNDER KOONDoo\* and others (*Plaintiffs*),

*versus*

BARUCK CHUNDER BOSE and others (*Defendants*).†

*Res judicata—Act VIII. of 1859, s. 2.—Suit for Rent.*

The plaintiffs brought this suit to establish, as against the defendants, their title to certain land in the occupation of a tenant. In a previous suit instituted by one of the present defendants against the tenant for rent, one of the present plaintiffs (representing the right now claimed by all of them) intervened as a defendant, on the ground that he was the person entitled to the rent, and failed to establish his claim. *Held*, following the Full Bench case of *Hurri Sunkur Mookerjee v. Mukhtaram Patro* (1), that the plaintiffs in this suit were barred by the judgment in the former suit.

When once it is made clear that the self-same right and title is substantially in issue in two suits, the precise form in which either suit was brought, or the fact that the plaintiff in the one case was the defendant in the other, became immaterial.

This case was referred to a Full Bench by Garth, C. J., and Mitter, J., by the following order:—

“This was a suit brought by the plaintiffs to recover possession of a one-anna share of a certain jote. In the year 1871, the plaintiffs claimed to be entitled to a 15-anna share of the said jote, and the defendant No. 1 to a one-anna share thereof. In that year the superior landlord of the jote sued some persons other than the defendant No. 1 for rent of the entire jote, and obtained a decree against them, under which the said tenure was put up for sale, and purchased by the defendant No. 4, who again sold the same share to all the plaintiffs in the name of the plaintiff No. 1. The defendant No. 1 then brought a suit (No. 1174 of 1872) for arrears of rent of the one-anna share against the occupying tenant of the jote, Mohun Chunder Dass, in which suit the plaintiff No. 1 intervened as a defendant, upon the ground that he, and

\* *Vide* I. L. R., 3, Calcutta, 145.

† Special Appeal, No. 794 of 1876, against a decree of Baboo Srinath Roy, Subordinate Judge of Zilla Furradpore, dated the 14th of February, 1876, affirming a decree of Baboo Unnoda Nath Mozoomdar, Officiating Munsif of Bhunga, dated the 6th July, 1875.

(1) 15 B. L. R., 238; S. C., 24 W. R., 154.



not the present defendant No. 1, was entitled to the rent claimed. Thereupon the question was raised in that suit, whether the then plaintiff (the defendant No. 1), or the then defendant (the present plaintiff No. 1) was entitled to the rent as owner of the one-anna share; and that question was adjudicated upon and decided against the present plaintiff. The intervening defendant in that case (the present plaintiff No. 1) claimed to be the owner of the entire jote, by virtue of the said sale to him on behalf of all the present plaintiffs; and the only question in this suit is, whether the plaintiffs (by virtue of that sale) are owners of the one-anna share of the jote as against the defendant No. 1, the plaintiff in the former suit?

"Both the lower Courts have held that the plaintiffs are barred by the judgment in the former suit (by virtue of s. 2, Act VIII. of 1859), upon the ground that the self-same question which was there raised and decided is also raised in this suit.

"The question has now come before us on special appeal, and as there appear to be conflicting decisions of this Court upon it,—see *Mussamut Inderbuttee Kooer v. Shaikh Muhboob Ali* (1), *Mohima Chunder Mozoomdar v. Asradha Dossee* (2), *Deokee Nundun Roy v. Kali Pershad* (3),—and as the point is one of general importance, we think it right to refer the question to a Full Bench.

"The question is, whether, under the circumstances stated, the plaintiffs are barred by the judgment in the former suit?"

Baboo *Obhoy Churn Bose* for the appellants.

Baboo *Bungshidhur Sen* for the respondents.

The following cases were referred to in the course of argument:—*Mussamut Inderbuttee Kooer v. Shaikh Muhboob Ali* (1), *Mohima Chunder Mozoomdar v. Asradha Dossee* (2), *Deokee Nundun Roy v. Kallee Pershad* (3), *Dhonaye Mundul v. Arif Mundul* (4), *Shib Pershad Panah v. Muddun Mohun Doss* (5), *Aukhil Chunder Mookerjee v. Shib Narain Ghose* (6).

The judgment of the Full Bench was delivered by

GARTH, C. J.—I am of opinion that in this case the plaintiffs are barred by the former judgment. It is to be observed, that the present suit is not to recover khas possession of the property in question. The

(1) 24 W. R., 44.

(2) 15 B. L. R., 251 note; S. C., 21 W. R., 207.

(3) 9 W. R., 366.

(4) 9 W. R., 306.

(5) 15 W. R., 415.

(6) *Id.*, 527.

land is in the occupation of a tenant, and the plaintiffs' only object is to establish their title to it as against the defendant No. 1. We have, therefore, to see whether the right and title which is the subject of claim in this suit was not the very same right and title which was in issue between the same parties, and determined in the former suit. When once it is made clear, that the self-same right and title was substantially in issue in both suits, the precise form in which the suit was brought, the fact that the plaintiff in the one case was the defendant in the other, becomes immaterial.

Now, in this instance, the plaintiff in the former suit is the same person as the defendant No. 1 in this, and he sued to recover from the occupying tenant the rent of the property now in dispute. In that suit one of the plaintiffs (representing and claiming the same right under the same title which is now claimed by all the plaintiffs) intervened as a defendant, and he resisted the then plaintiff's claim to the rent, upon the ground that he (representing the present plaintiffs' interest) was entitled to it as the owner of the property. An issue was, accordingly, framed in that suit, as to whether the then plaintiff (the present defendant No. 1) was entitled to the rent as owner of the property in question as against the then defendant who represented the present plaintiffs. This question was contested between them in that suit upon the same title and materials which are now brought forward in the present suit, and the only difference is, that the plaintiff in that suit is the defendant in this.

On the other hand, it is argued by the appellant, that the claim in the former suit was for rent against the tenant; that the only issue in that case was whether the plaintiff was entitled to that rent, and that the question of title raised by the intervening defendant was only incidental to the main issue. But as between the plaintiff and the intervening defendant the question, and the only question, was that of title, and as the defendant in that suit chose to intervene and to raise that question between himself and the plaintiff, he, and those whom he represented, must take the consequences of their intervention.

Our decision in this case will be found entirely in accordance with the views expressed by the Full Bench in the case of *Hurri Sunkar Mookerjee v. Muklaram Patro*.<sup>(1)</sup>

The appeal will be dismissed with costs.

(1) 15, B. L. R., 238; S. C., 24 W. R. 154.

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# CALCUTTA HIGH COURT.

*The 13th May and 3rd June, 1878.*

FULL BENCH.

Before the Hon'ble Sir R. Garth, Kt., Chief Justice, and the Hon'ble L. S. Jackson  
C. I. E., W. Markby, W. Ainslie and R. C. Mitter, Justices.

**SHEIK GONI MAHOMED (Defendant) *Appellant*,**

*versus*

**P. D. MORAN (Plaintiff) *Respondent***

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**DURGA PERSHAD MYTI and another (Defendants) *Appellants*,**

*versus*

**JOY NARAIN ILAZRA, (Plaintiff) *Respondent*.**

*Co-sharer—Suit for Kabuliut—Suit for Enhancement.*

The co-sharer of an undivided estate, who has made separate collections from the tenant of the whole estate in respect of his share, cannot sue to obtain a kabuliut at an enhanced rent for his share of the tenure, the other co-sharers not being made parties to the suit; neither can he sue to enhance the rent of that share separately, without joining the other co-sharers of the tenure.

The facts of these cases are fully explained in the following order of reference:—

As the question in each of these cases is of a somewhat similar character, and seems to depend upon the same principle, and as, on looking into the authorities, there appears to be some difference of opinion in this Court upon the subject, we think it right to refer both cases to the decision of a Full Bench.

In Letters Patent, Appeal No. 1713 of 1876, the suit was brought by an ijaradar against a ryot for a kabuliut at a certain rent.

The plaintiff had taken an ijara, for a term of years, of a moiety of an undivided estate. The defendant was the tenant of a nunker jote within this estate, at a rental of Rs. 16-8, and it has been found that, for some years before the suit, he had been paying Rs. 8-4 separately to Rama Nund and Anundo Moyi, who were the owners of one moiety of the entire estate.

The Lower Court held that, as he had thus paid a separate rent to the plaintiff's lessors, the plaintiff was entitled to sue him for a kabuliut, and decided accordingly, which decree was upheld by Mr. Justice White. The case of *Rama Nauth Rokhit versus Chand Huri* and others, XIV., Weekly Reporter, page 432, is an authority in favor of that

position, and the case of *Surut Sundori Dabia versus Watson and others*, XI, Weekly Reporter, page 25, seems opposed to it.

In the Letters Patent Appeal, No. 2601 of 1876, the suit was brought by an ijaradar of a one-third share of an undivided estate to recover, at an enhanced rate, one-third of the rent of a tenure held by the defendant within that estate.

It was found that the tenant had, for some time, been paying his one-third share of rent separately to the plaintiff's lessors, and the Subordinate Judge held that there was nothing to prevent the plaintiff from enhancing his share of the rent by a separate suit, inasmuch as his collections had been separate.

In special appeal, we find that it was held by Justices Kemp and E. Jackson (*Dookhi Ram Sircar versus Gowhur Mundul*, X., Weekly Reporter, 300), that a suit to enhance a separate share of the rent of an undivided estate will not lie. The suit should be to enhance the entire rent of the estate. (See also per Justices Kemp and Glover, XVII., Weekly Reporter, 314.)

The questions which we refer for the opinion of the Full Bench are :—

*First*,—Whether the ijaradar of a co-sharer of an undivided estate, who has made separate collections from the tenant of the whole estate, in respect of his share, can sue to obtain a kabuliut at an enhanced rent for his share of the tenure, the other co-sharers not being made parties to the suit ?

*Second*,—Whether the ijaradar of a co-sharer of an entire tenure, who has for some time realized his rent separately in respect of his share, can sue to enhance the rent of that share separately, without joining the other co-sharers of the tenure ?

RICHARD GARTH.

E. G. BIRCH.

The judgment of the Full Bench, delivered by Garth, C. J., was as follows :—

We think that both questions referred to us should be answered in the negative. They both depend upon similar considerations, and must be governed by the same principles.

We understand that, in both cases, the entire tenure was originally held by the tenant under all the co-sharers at an entire rent; but that by some arrangement amongst themselves, consented to by the co-sharers on the one hand, and by the tenant on the other, the latter had

been in the habit of paying a portion of the rent to each co-sharer in respect of his separate share.

Such arrangements are by no means unusual, and they may be evidenced either by direct proof, or by usage, from which their existence may be presumed. But in either case they are perfectly consistent with the continuance of the original lease of the entire tenure; and the same consent of all the parties, by which the arrangement was originally created, may at any time put an end to it.

So long as it continues, however, it has been constantly held in this Court, and must be considered now as well-established law, that each co-sharer may bring a separate suit against the tenant for his share of the rent. But in the absence of such an arrangement it is equally clear that no such suit can be maintained.

(See *Gunga Narain Doss and others versus Sharoda Mohun Roy* and others, XII., Weekly Reporter, page 30; *Sree Misser and others versus Crowdy*, XV., Weekly Reporter, p. 243; *Dino Chunder Chowdry and Dinnonath Mookerjee versus Doorga Dass Dutt*, XIX., Weekly Reporter, 168 and *Lalun versus Hemraj Singh*, XX., Weekly Reporter, 76.)

But a suit for a kabooliut, under such circumstances, by one co-sharer against the tenant is a very different thing from a suit for arrears of rent. The separate suit for arrears, as we have already said, is perfectly consistent with the continued existence of the original lease of the tenure. A kabooliut, by which an entirely new and separate tenancy is created is obviously inconsistent with it. A suit for arrears deals only with the past, a suit for a kabooliut binds the tenant in the future. In fact it is binding upon both parties, because the co-sharer who obtains a kabooliut, is bound, at the request of the tenant, to give him a pottah upon the same terms, and the grant and acceptance of a binding lease of the separate share cannot exist contemporaneously with the original lease of the entire jote. This is quite in accordance with the view of Norman, Acting C.J., and Dwarkanath Mitter, J., in the Full Bench case reported in 15, Weekly Reporter Full Bench, 21, in which Mr. Justice Mitter points out the distinction between a mere separate payment of rent to a co-sharer and a claim for a kabooliut as to the separate share (see also XI. Weekly Reporter, page 25.)

The only authority to the contrary appears to be the decision of Bayley and Paul, J. J. (XIV., Weekly Reporter, 432;) but it is not clear from that case whether the tenure had ever been held at an entire rent; and at any rate the distinction between a separate payment of

rent by arrangement, and a binding lease of a separate share, does not seem to have been considered.

Of course, if the original lease of the entire tenure is cancelled, or put an end to by the consent of all the parties, the co-sharers and the tenant are at liberty to enter into any fresh contracts which the law allows; but no Court of Justice ought to presume such a cancellation or determination of the lease, from the mere fact of a separate payment of rent to one or more of the co-sharers.

The right of one co-sharer to enhance the rent of his share separately must be governed by the same principles as his right to a ka-booliut.

The Rent Law, in our opinion, does not contemplate the enhancement of a part of an entire rent; and the enhancement of the rent of a separate share is inconsistent with the continuance of the lease of the entire tenure.

In each of the special appeals therefore, 1713 and 2601, the judgment of the Lower Court and of the High Court will be set aside, and the plaintiff's suit in each case will be dismissed with costs in all the Courts.

## PRINCIPLES OF THE INDIAN PENAL CODE.

*[As explained by the original framers and laid before the Governor General of India in Council in the year 1837.]*

### NOTE C.

*In continuation of page 235.*

#### ON THE CHAPTER OF OFFENCES AGAINST THE STATE.

His Lordship in Council will perceive that in this Chapter we have provided only for offences against the Government of India, and that we have made no mention of offences against the General Government of the British Empire. We have done so because it appears to us doubtful to what extent his Lordship in Council is competent to legislate respecting such offences. The Act of Parliament which defines the legislative power of the Council of India especially prohibits that body from making any law "which shall in any way affect any prerogative of the Crown, or the authority of Parliament, or any part of the unwritten laws, or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend, in any degree, the allegiance of any

person to the Crown of the United Kingdom, or the Sovereignty, or Dominion of the said Crown over any part of the said territories "

It might be argued that these words relate only to laws affecting the rights of the Crown and of Parliament, and not to laws affecting the penal sanctions of those rights, and that, therefore, though the Governor General in Council has no power to absolve the King's subjects from their allegiance, he has power to fix the punishment to which they shall be liable for violating their allegiance. It seems to us, however, that there is the closest connection in this case between the right, and the penal sanction, that a power to alter the sanction amounts to a power to abolish the right, and that Parliament, which withheld from the Indian Legislature one of those powers, cannot be supposed to have intended to grant the other.

If the Governor General in Council has the legal power to fix the punishment of a subject who should, in the territories of the East India Company, conspire the death of the King, or levy war against the King, then the Governor General in Council has the legal power to fix that punishment at a fine of one anna ; and it is plain that a law which should fix such a fine as the only punishment of regicide and rebellion would be a law virtually absolving all subjects within the territories of the East India Company from their allegiance.

This part of the penal law, therefore, we have not ventured to touch. We leave it to the Imperial Legislature. But we trust that we may be permitted to suggest to his Lordship in Council that the early attention of the Home Authorities should be called to this subject.

There is no doubt that the Criminal Statute Law of England is not binding generally on a native of India in the mofussil. Whether the Statute Law relating to treason be binding on such a native is a question with respect to which we do not venture to give a decided opinion. It seems to us exceedingly doubtful whether that part of the Statute Law be binding on such a native. It is quite certain that no Court has ever enforced it against such a native, and that, in the opinion of many respectable and intelligent Judicial Officers in the service of the Company, it could not legally be enforced against such a native. Nor are the Company's Judicial Officers, by whom alone such a native can legally be tried, likely to be accurately acquainted with the Statute Law of England on the subject of treason, or with the mass of constructions and precedents by which that law has been overlaid. If such a native be not punishable under the English Statute Law of treason, it

is difficult to say under what law he could be punished for that crime. The Regulations contain nothing on the subject. The Council of India we conceive is not competent to legislate respecting it. The Mahomedan law might possibly be so violently strained as to reach it in Bengal and in the Madras Presidency and in the Bombay Presidency it might possibly be brought within that Clause, which arms the Courts with an enormous discretion in cases in which they conceive that morality and social order require protection. But there are in our opinion strong reasons against retaining either the Mahomedan penal law, or the sweeping Clause of the Bombay Regulations to which we have referred.

It may be added that the provision of the Bombay Regulations to which we have referred applies only to persons who profess a religion with which a system of penal law is inseparably connected. Unless therefore the English Statute Law on the subject of treason applies to natives in the mofussil, a point respecting which we entertain great doubt, a native christian who should, at Surat, assist the levying of war, not against the Company's Government, but against the British Crown, would be liable to no punishment whatever.

This anomalous state of things may be, in some degree, explained by the singular manner in which the British Empire grew up in India. The East India Company was, during a long course of years, in theory at least, under two masters. It was subject to the King of England. It was subject also to the Great Mogul. It derived its corporate existence from the British Parliament. It held its territorial possessions by a grant from the Duibar of Delhi. The situation of the native subjects of the Company bore some analogy to that of the inhabitants of Mindelheim, while that fief of the Empire was held by the Duke of Marlborough. The inhabitants of Mindelheim were subjects of the Duke of Marlborough, but they owed no allegiance to the English Crown, though their Sovereign was subject to that Crown. It was in this way that the British Empire in India originated. It was long considered as a wise policy to disguise the real power of the English under the forms of vassalage, and to leave to the Mogul and his Viceroys the empty honors of a Sovereignty which was really held by the Company. This policy was abandoned slowly and by imperceptible degrees. The recognition of the supremacy of the King of Delhi appeared on the seal of the British Government down to a late period, and on its coin down to a still later period. A great change has indeed



taken place since the grant of the Dewannee of the lower provinces to the Company, but it has taken place so gradually that, though it would be absurd to deny that the natives of British India are now subjects of his Majesty, it would be impossible to point out the particular time when they became so.

To these circumstances we attribute most of the anomalies which are to be found in the legal relation subsisting between the natives of British India and the General Government of Empire. It seems highly desirable that the Imperial Legislature should do what cannot be done by the Local Legislature, and should pass a Law of high treason for the territories of the East India Company. As far, indeed, as respects the Royal person, the present state of the Law, though in theory unseemly, is not likely to cause any practical evil. It is highly improbable that any English King will visit his Indian dominions, or that any plot having for its object the death of an English King will ever extend its ramifications to India. But it is by no means improbable that persons residing in the territories of the East India Company may be parties to the levying of war against the British Crown, without violating any local regulation. If any insurrection were to take place in any of the British dominions in the Eastern Seas, in Ceylon, for example, or in Mauritius, it is by no means improbable that persons residing within the Company's territories might furnish information and stores to the rebels. And if this were done by a person not subject to the jurisdiction of the Courts established by Royal Charter we are satisfied that there would be the most serious difficulty in bringing the criminal to legal punishment.

We have, his Lordship in Council will perceive, made the abetting of hostilities against the Government in certain cases a separate offence, instead of leaving it to the operation of the general Law laid down in the Chapter on abetment. We have done so for two reasons. In the first place war may be waged against the Government by persons in whom it is no offence to wage such war, by foreign princes and their subjects. Our general rules on the subject of abetment would apply to the case of a person residing in the British territories who should abet a subject of the British Government in waging war against that Government, but they would not reach the case of a person who, while residing in the British territories, should abet the waging of war by any foreign prince against the British Government. In the second place we agree with the great body of legislators in thinking that,

though in general a person who has been a party to a criminal design which has not been carried into effect ought not to be punished so severely as if that design had been carried into effect, yet an exception to this rule must be made with respect to high offences against the State. For State-crimes, and especially the most heinous and formidable State-crimes, have this peculiarity, that if they are successfully committed the criminal is almost always secure from punishment. The murderer is in greater danger after his victim is dispatched than before. The thief is in greater danger after the purse is taken than before. But the rebel is out of danger as soon as he has subverted the Government. As the Penal Law is impotent against a successful rebel, it is consequently necessary that it should be made strong and sharp against the first beginnings of rebellion, against treasonable designs which have been carried no further than plots and preparations. We have therefore not thought it expedient to leave such plots and preparations to the ordinary Law of abetment. That Law is framed on principles which, though they appear to us to be quite sound, as respects the great majority of offences, would be inapplicable here. Under that general Law a conspiracy for the subversion of the Government would not be punished at all, if the conspirators were detected before they had done more than discuss plans, adopt resolutions, and interchange promises of fidelity. A conspiracy for the subversion of the Government which should be carried as far as the gun powder treason, or the assassination plot against William the Third, would be punished very much less severely than the counterfeiting of a rupee, or the presenting of a forged check. We have, therefore, thought it absolutely necessary to make separate provision for the previous abetting of great State offences. The subsequent abetting of such offences may, we think, without inconvenience be left to be dealt with according to the general law.

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## PRIVY COUNCIL.

*The 5th February, 1878.*

## PRESENT :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

SHEEMUTTY NITTOKISSOREE DOSSEE,\* ... *Defendant,*

\* versus

JOGENDRO NAUTH MULICK, ... *Plaintiff.*

ON APPEAL FROM THE HIGH COURT AT BENGAL.

*Hindu Widow—Amount of Maintenance.*

Case in which some of the elements in determining what is a suitable amount of maintenance for a Hindu widow out of her deceased husband's estate were considered

A Court is not justified in reducing, as a kind of punishment for vexatious defence to a suit, the amount of maintenance which it would otherwise have awarded.

Appeal from a judgment of a Divisional Bench of the High Court (Sept. 18, 1875), composed of two Judges (*Garth*, C. J., and *Macpherson*, J.), sitting in the exercise of original jurisdiction : see sect. 16 of the Letters Patent of that Court.

The facts of the case fully appear in the judgment of their Lordships.

*Leith*, Q. C., *Doyne*, and *Woodroffe*, for the Appellant.

*Cowie*, Q. C., *Graham*, and *Mayne*, for the Respondent.

Upon the question of the amount of maintenance suitable to be decreed under the circumstances, *Comulmoney Dossee v. Rammanath Bysack*† and Sir F. Macnaghten's Considerations of Hindu Law, p. 92, were referred to.

The judgment of their Lordships was delivered by

SIR MONTAGUE SMITH :—This is an appeal from a judgment of the High Court of Bengal sitting in its ordinary original jurisdiction. The action is brought by *Jogendro Nauth Mullick*, claiming to be the adopted son of *Choytun Churn Mullick*; and the Defendant in the suit (the Appellant) is *Nittakissoree Dossee*, the widow of *Choytun Churn*, and his heir in default of his leaving a natural or adopted son. The principal question in the suit was whether the Plaintiff had been adopted by *Choytun Churn* or not. A great deal of evidence was gone into upon both sides upon the issue so raised. It is unnecessary for their Lordships to advert to that evidence, inasmuch as the learned counsel for the Appellant, upon his opening at their Lordships' Bar, expressed his inability to overturn the judg-

\* *Vide*, 5 Law Reports, Indian Appeals, p. 55.

† *Fulton's Rep.*, 190.

ment on that issue by any argument that he could raise before us upon the evidence. Their Lordships think that in taking that course he exercised a wise discretion, and in no way injured the interests of his client. They have read the judgment of the High Court, and it appears to them that the case was very carefully tried. The judgment contains a lucid and elaborate analysis of the evidence, and assuming that analysis to be accurate, their Lordships can have no doubt that the Court arrived at a sound conclusion in declaring that the adoption had taken place.

Another question arises however in the suit, namely, the maintenance to which the Defendant is entitled as a widow, upon the assumption that the Plaintiff was the adopted son of her husband. Their Lordships would be extremely reluctant to interfere with the decision of the Court below upon a question of maintenance, and they would hesitate very much to do so unless there were some special circumstances in the case which indicated that there had been a miscarriage in the way in which the maintenance had been arrived at. It appears to have been the usual course, when there was a Master attached to the Court, for the Court to refer to the Master the question of maintenance, and to consider the proper amount upon hearing the report. In this case the Court did not apparently make any separate inquiry with regard to the maintenance, but acted upon the facts as they appeared in evidence before them, upon the general case. An ordinary form of reference appears to have been this: "Refer it to the Master to settle the amount, regard being had to the value of the estate." Their Lordships think that another element to be considered is the position and *status* of the deceased husband and of the widow. The main subject of inquiry would be the value of the estate, and the question for the Master, and ultimately for the Court, to consider would be the due proportion which should be given to the widow out of it for her proper maintenance, including not only the ordinary expenses of living, but that which she might reasonably expend for religious and other duties incident to the station in life which she might occupy.

In this case, independently of the value of the property which has been disputed at their Lordship's bar, there were circumstances which the Court took into consideration, and which their Lordships think may properly be taken into consideration, not as conclusive upon the amount which ought to be awarded, but as affording some guide to the proper amount, if not a measure of it. It seems that the husband, *Choytun*

*Churn*, about two years before his death, had given instructions for his will. That will was never executed, but the papers connected with it were given in evidence by the Plaintiff, and were relied upon as affording strong corroboration of his adoption. *Choytun Churn* himself gave instructions for his will to a solicitor of the name of *Sreenauth Chunder*, who happened to be the brother of *Jogendro*, the Plaintiff, and who was a partner in the firm of *Swinhoe, Law, & Co.* It seems that the testator in his first instructions desired that the interest of a lakh of rupees, in Government paper, should be given to his widow, and, in addition thereto, that she should live in the family house, and be maintained out of his general estate, as she had been in his life-time. It seems that a draft was made in conformity with these instructions, which was copied; and after receiving the copy *Choytun Churn* had another interview with *Sreenauth*, and that interview he altered the instructions which he had previously given, and instead of bequeathing the interest of one lakh of rupees to his widow for life, he desired that the lakh should be given to her absolutely. An engrossment was made of the will containing that bequest. Upon this question of maintenance the Court say, at the end of their judgment, after they had disposed of the principal issue that arose upon the adoption, "Under these circumstances, if it had been left to the Court to determine the sum which should be awarded to the Defendant in the future for her maintenance we should only have given her the most moderate provision which, having regard to her husband's property and position, the law would allow." The circumstances to which the learned Judges allude are those contained in their summary of the case which appears in the previous paragraph of their judgment, and there, after stating the main positions which they find in favour of the Plaintiff and of the adoption, they add, "That the fact of the Plaintiff being *Choytun Churn's* adopted son was perfectly well known to the Defendant and to all the members of the family." The Court therefore seem to have thought that she was not justified in defending the claim of the Plaintiff as she had done, and that opinion does appear to have influenced their judgment in awarding the maintenance which they thought sufficient to be allowed to her. They say, "We should only have given her the most moderate provision under those circumstances." One cannot read that passage without perceiving that the Court reduced as low as they could, upon the principle upon which they proceeded, the maintenance which they allowed, as a kind of punishment to her for having defended a

suit which they thought she must have known was properly brought against her. That the Court, being under this influence, should have allowed its judgment to be affected by it, their Lordships think was a departure from the strict principles which ought alone to have guided it. That influence operating on the minds of the Judges, they proceed to consider what they would allow; and in coming to that conclusion they bear in mind the bequest of the lakh of rupees intended to be made to her absolutely, and they refer to an offer which had been made by the Plaintiff. This is what they say:—"But the Plaintiff himself has relieved us of what might otherwise have been an unpleasant duty. He has intimated to us through his counsel that he desire the Defendant to have the same provision as she would have had if her husband's will had been duly executed." This they state to have been the desire of the Plaintiff. "And although, having regard to the Plaintiff being infant, we do not consider it right to hand over to the Defendant absolutely a lakh of rupees out of the Plaintiff's property, we think we may without impropriety award her as maintenance the annual sum of Rs. 4000 payable monthly." If the objection was to handing over the *corpus* of a lakh of rupees, that might have been obviated by turning the value of the lakh of rupees into an annuity for the life of the widow, which would have produced a much larger sum than the interest merely at 4 per cent. upon the capital. Their Lordships do not say that the Judges were bound to do this; but on the principle on which they would apparently have acted but for the influence on their minds arising from the conduct of the Defendant in the suit, it seems not improbable that that is a conclusion at which they might have arrived. However, what they did was to award a sum of Rs. 4000. Their Lordships wish to guard themselves against its being supposed that they consider the Plaintiff bound by his offer, or that the widow is entitled to the lakh of rupees because it was intended to be given to her by the will. They think both those circumstances can be regarded only as elements which may properly be considered in determining a suitable amount of maintenance; and inasmuch as the Plaintiff at one time, through his guardian as it must have been, was willing to settle the matter amicably and to give the widow, and—as the Judges expressed it—desired that she should have the lakh of rupees, their Lordships entertain hope that when the matter is brought before him—if it should be brought before him in India—now he is of full age, he may be disposed to renew that offer, and if not to give the *corpus* of the lakh of

rupees, to give an annuity which such a sum would produce. Their Lordships feel that they can do no more than send the case back with that intimation of their hope, and with this further intimation to the counsel here that, judging, as they do, from what they have seen in the Record and what they have heard from the learned counsel, they think that it would not be unfair to either of the parties if they could agree upon raising this sum of Rs. 4000 a year to Rs. 6000. Their Lordships feel that they cannot impose this arrangement upon the parties, but they throw it out as well worthy of their consideration to prevent any further litigation. If that sum is agreed to, then their Lordships would amend the decree here, by consent, by increasing the sum to Rs. 6000. If that is not assented to, their Lordships will have no other course but humbly to advise Her Majesty to remit the suit to the High Court of *Bengal* to determine, with reference to the considerations that they have thrown out, the proper amount of maintenance to be allowed to the widow.

On the 12th of February it was intimated to their Lordships by counsel on both sides that the parties in *India* adopted the suggestion made by their Lordships in the foregoing judgment, and their Lordships therefore agreed humbly to report to Her Majesty that, the parties having consented thereto, the decree of the High Court of Judicature ought to be varied by raising the allowance to the widow for maintenance from Rs. 4000 to Rs. 6000 a year, and further that in other respects the decree ought to be affirmed, each party paying their own costs of this appeal.

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## HINDU JOINT FAMILY.

*The following is a digest of rulings on Hindu Joint Family published in the fifteen volumes of the Bengal Law Reports as well as the Supplemental Volume containing Full Bench Rulings.*

1.—*Joint family—Separate Acquisition—Onus probandi.*] Where the plaintiff, a member of a joint Hindu family, claimed a share in certain property as having been purchased with the joint funds, and the defendant alleged that it was purchased by him with his own funds; and it was proved that the joint family property was not at the time of the purchase sufficient, after supporting the family, to leave any surplus funds from which the property in suit could have been purchased, held, that the presumption of joint ownership was rebutted, and it was for the plaintiff to show the acquisition of the property with joint funds. The party alleging self-acquisition is not in every case bound to show the source from which the purchase-money was derived. *Dhunookdharee Lall v. Gunput Lall*—xi. 201 Note.

2.—In a suit by a purchaser to recover a share in certain property of one of three brothers, who were admittedly living in commensality, the plaintiff alleged the property was purchased by his vendor and the other brothers with joint funds, the defendants alleging that it was bought by one of them other than the plaintiff's vendor with his separate funds. Held, the onus was on the plaintiff to show that there was a joint fund from which the property could have been purchased. There can be no presumption of joint ownership from the mere fact of commensality. *Khilut Chunder Ghose v. Koonjlall Dhur*—xi. 194, Note.

3.—*Purchase from one member—Notice of joint character of Property.*] Presumably, every Hindu family is joint in food, worship, and estate; and this presumption applies in the absence of any evidence of a nucleus of joint property, and even without evidence that the family is undivided. A purchaser, therefore, from one member of a Hindu family is affected with notice of the claims of the other members. *Gobind Chunder Mookerjee v. Doorgapersad Baboo*—xiv. 337.

4.—*Separate acquisition—presumption—Onus probandi—Nucleus.* *Sembla.*—When property has been purchased by an individual member of a joint Hindu family, the burden of proof is on those who claim to be joint property to show that there was a nucleus of joint property out



of which it could have been purchased. *Denonath Shaw v. Hurry Narain Shaw*—xii. 349.

5.—*Separate acquisition—Presumption—Onus Probandi.*] The plaintiffs sued to have their rights declared under a mokurari maurasi lease obtained by *I.*, father of the defendant, but it was said with joint funds and for the joint family, which consisted of *I.* and his two brothers, fathers of the plaintiffs. The defence was that the lease was granted to *I.* after the dissolution of commensality. The existence of any nucleus of joint property was not proved. Held that, where one member of a joint family is found to be in possession of any property, the family being presumed to be joint estate, the presumption is, not that he was in possession of it was separate property acquired by him, but as a member of a joint family. Therefore, the burden of proof was on the defendant to show that *I.* had acquired the property separately, and that it was property which could by law be treated as a separate acquisition. *Taruck Chunder Poddar vs. Judeshur Chunder Koondoo*—xi. 13.

6.—*Separate acquisition—Presumption—Onus Probandi.*] The presumption of Hindu law that any property acquired during the time a Hindu family remains joint belongs to all the members of the joint family, does not take away the onus which lies on the plaintiff in a suit to recover a share of the property of proving his case; it merely aids him in proving it. Such presumption is liable to be rebutted by means other than inquiring as to the source from which the purchase-money of the property was derived. That criterion, though the most satisfactory, is not indispensable. Evidence that the property claimed to be joint was purchased in the name of one member only, that after the purchase the members separated, and each member carried on business separately, and that the property was thenceforward in the exclusive possession, and used for the business, of the member in whose name it had been purchased, is evidence sufficient to rebut the presumption that the property was joint. *Bholanath Mahta v. Ajoodhia Persad Sookal*—xii. 336.

7.—*Joint family—Separate acquisition—Onus Probandi—Purchase by one member of family in his own name, but with joint funds.*] In a suit by a member of a joint Hindu family to recover possession of certain property alleged to belong to the joint estate, but which had been purchased by the defendants at a sale in execution of a decree passed against the estate of *X.*, one member of the family, for his separate debt,

the defendants sought to rebut the presumption that the property in dispute was part of the joint estate by showing that, though the members of the family were joint in food, and at particular seasons of the year lived together in the family dwelling-house, they also had separate dealings and funds of their own; and that while the family had some ancestral estate, several members of the family had acquired separate property from their own funds, and dealt with it as their own without reference to the other members of the family. They also relied on the following facts as showing that the property in dispute was the separate property of *R.*, viz., that during *R.*'s life-time the other members of the family allowed him to appear to the world as the sole owner thereof, and on one occasion when *R.*, *B.* the *kurta*, and a third member of the family, entered into a security-bond with the Collector, whereby *R.* pledged this property, and the two others pledged other properties, each of them described the property pledged by him as being in his possession "without the right of any co-sharers." On the other hand the plaintiff, in addition to oral evidence to show that the property in dispute had been purchased out of the joint family funds, although the purchase was made in the name of *R.* alone, filed the family account-books and the private account-books of *R.* for the same purpose, as well as certain letters which passed between *B.* and *R.* relative to the purchase of the property. *Held*, that the evidence as to the separate trading funds and property of the several members of the joint family, and their independent dealing with such property, disclosed such a state of things as might be fairly held to weaken, if not altogether to rebut, the ordinary presumption of Hindu law as to property in the name of one member of a joint family, and to throw upon the plaintiff the onus of establishing the joint nature of the property claimed by clear and cogent evidence. *Held* also, that the mere fact that *R.*, while trading on his separate account, was permitted by the other members of the joint family to appear to the world as the sole owner of family estates, did not disentitle those members to recover from the defendant, the purchaser at a sale in execution of a decree against *R.*, their own share of such estates. *Bodh Sing Doodbaria v. Gunesh Chauder Sen*—xii. P. C. 317.

8.—*Onus probandi—Presumption.*] The normal condition of a Hindu family being joint, it must be presumed to remain joint, unless some proof of a subsequent separation is given; and where property is shown to have been once joint family property it is presumed to remain joint until the contrary is shown; but the mere fact of a family being

joint is not enough to raise a presumption in law that property acquired by one member of that family is joint property. Where *A.*, as purchaser, claimed a share in property as being joint family property,—*held*, that *A.* was not only bound to show that the family was joint, but that the property in question became joint property when acquired, or that at some period since its acquisition it had been enjoyed jointly by the family. *Shiu Golam Sing v. Baran Sing*—i. A. C. 164.

9.—*Onus probandi—Presumption.*] The mere fact of a Hindu family living in commensality is not sufficient to raise a presumption of their property being joint. The existence of joint funds out of which the property might have been purchased must also be proved to raise the presumption of the property being joint. *Radhika Prasad Day v. Dharma Dasi Debi*—iii. A. C. 124.

10.—*Purchase—Presumption arising from commensality.*] The mere fact of one person living jointly or in commensality with others, affords no presumption that property purchased by that person was purchased with the joint funds. *Kristo Chunder Kurmoker v. Rughoonath Kurmoker*—xii., 35 $\frac{1}{2}$  Note.

11.—*Ancestral property—Registration of name of one member as proprietor—Onus probandi.*] Where property is proved to be ancestral, the mere registration of one brother as proprietor is of little value as supporting a case of the property not being joint, and the burden of proving that the property is not joint rests on him who alleges that to be the case. *Amrit Nath Chowdhry v. Gauri Nauth Chowdhry*—vi. P. C. 232.

12.—*Debts incurred for family purposes.*] *N.*, *G.*, and *H.* were three brothers living together as a joint Hindu family. After the death of *N.* and *G.* decrees were obtained against *N.*'s widow, and satisfied by her in respect of monies borrowed by *N.* and *H.* as the managing members of the family and spent for family purposes, while *G.*'s widow was living in the family. In a suit by *N.*'s widow for contribution against *G.*'s widow, *held*, that though no legal necessity had been shown for borrowing, the defendant was bound to pay her share as the money had been spent for family purposes while she was living in the family. *Bimala Debi v. Tarasundari Debi*—vi., Ap. 101.

13.—*Managing member—Liability to account.*] A managing member of a joint Hindu family is bound to render an account of his management to his co-sharers, and he is liable to a suit if he refuses to do so. And such suit will lie even if the parties suing were minors during the

period for which the account is asked. *Abhaychandra Roy Chowdry v. Pyarimohun Goho—v., F. B 347.*

14.—*Account—Partnership.*) The manager of a joint Hindu family is not, by reason of his occupying that position, bound to render an account to the other members of the family. There is no analogy in this respect between a joint Hindu family and a partnership. Where it was arranged amongst the members of a joint Hindu family that the accounts of a banking business carried on by them should be kept on the understanding that the profits, when realized, should be divided amongst the individual members in certain proportions, and that the expenses of each member should be credited and charged in the name of each member,—*held*, that this was in the nature of a partnership, and an account was decreed. *Ranganmani Dasi v. Kasinath Dutt—iii. O. C. 1.*

15.—*Mortgage of joint family property—Powers of karta—Acknowledgment by karta or by executor under Hindu will—Acquiescence.*) *H.* a Hindu, died, leaving two adult and two minor sons, and having made a will, or *anumatipatra*, addressed to his two eldest sons, *L.* and *G.*, whom he thereby appointed *malik mukhtars* of the whole of his estate with full powers of management. He directed them to maintain his widow and minor sons, and to pay the marriage expenses of the latter out of the joint estate; and further directed them to pay his liabilities, and, if necessary, to raise money for that purpose by sale or mortgage; the necessary documents to be signed by *L.* and *G.*, “the names of the infants being signed by you as guardians and executors.” In case of the death of either *L.* or *G.*, the will provided that all the powers of the executors should be vested in the survivor; the minors to have the same powers upon attaining majority. The will further provided that the executors should, when the minors came of age, “make over to them with explanation the share of each;” and that the four sons should take the property in equal shares. *L.* died after his father, leaving a widow, and having made a will, whereof he appointed *G.* executor, and *G.* subsequently obtained a certificate under s. 7, Act XL. of 1858, in respect of the property of his minor brothers. Thereafter *G.*, by a deed in the English form, which was executed by him alone “as executor of *H.*” and also “as executor of *L.*,” mortgaged a portion of the property to the plaintiff to secure Rs. 6,847-3 8. Of this sum Rs. 947-3-3 were advanced to *G.* at the time of the mortgage, and were applied by him for the benefit of *H.*’s estate, Rs. 1,000 were advanced to pay a debt due from *L.* to third persons, the remainder being in respect of debts of *H.*,

all of which, however, with the exception of one debt of Rs. 100, were barred by the law of limitation. In a suit by the mortgagee for an account and sale, or foreclosure of the mortgaged property, it appeared that one of the minors had attained his majority when the mortgage was executed, and the other some years thereafter, and that both had been informed of the mortgage several years before the suit, and had then raised no objections. No question as to the effect of the limitation law on the mortgage was raised on the pleadings or at the trial. *Held* by MARKBY, J., that although the mortgage was not executed in accordance with the will of *H.*, the younger sons had stood by and had taken the benefit of the transaction, and could not, therefore, question it. A member of a joint Hindu family is bound, when he comes of age, to make himself acquainted with the acts during his minority of the manager, and to express his dissent at once if he disapprove of such acts. No evidence having been offered as to *L.*'s estate when the mortgage was executed, or that *L.*'s widow knew of the mortgage, the suit must be dismissed as against her. *Held* on appeal, by COUCH, C. J., and PONTIFEX, J., that debts by Hindu law being a charge upon the estate of the debtor, and the intention of *H.*, as shown by the provision in his will for the maintenance of his widow and minor sons, being that the family should for a time continue to be joint, no charge or trust was created by the clause in *H.*'s will for payment of his debts, and therefore the fact that, in executing the mortgage, *G.* professed to act under the will and not as *karta*, did not invalidate the mortgage. For the same reason, the clause for payment of debts could not prevent the operation of the law of limitation. The manager of a joint Hindu family, or the executor of a Hindu will, has no power by acknowledgment to revive a debt barred by the law of limitation, except as against himself. *G.*, as *karta* of the joint family, could not make a valid mortgage of *L.*'s share separately from the shares of the other members of the family; his estate therefore was liable to pay the plaintiff the Rs. 1,000 borrowed to pay *L.*'s debt, and his representatives could claim to be repaid from *L.*'s estate. *Gopalnarain Mozoomdar v. Muddomutty Guptae*; *Shosheebhoosun Mozoomdar v. Muddomutty Guptae*; *Muddomutty Guptae v. Bamagoondery Dossee*—xiv. 21.

16.—*Mitakshara law*—*Survivorship*—*Mortgage of share in joint family property*. A member of a Hindu family living under the Mitakshara law and having joint family property, died entitled to an undivided share in such property, leaving two widows him surviving. The widows

were sued in their representative capacity in respect of debts incurred by him during his life-time on his own account, and decrees were obtained against them. In execution, an interest in certain portions of the joint family property, to the extent of the share to which the deceased was entitled in his life-time, was sold, and the auction-purchasers obtained possession of it. *Held*, that the share of the deceased did not at his death pass to his widows, but that there being no male issue it passed to the remaining members of the family by survivorship, and could not be rendered liable to the debts of the deceased in a suit against his widows. *Quere*.—Whether those who take the share by survivorship are liable for the debts of the deceased to the extent of his share? A member of a joint Hindu family has no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family. *Sadabart Prasad Sahu v. Foolbush Koer*—iii. F. B. 31.

17. There is nothing in *Rajaram Tewari v. Luchman Prasad* (Sup. Vol. 731) or in *Sadabart Prasad Sahu v. Foolbush Koer*, to justify the contention that where there is an alienation made by one shareholder, and another sharer sues to set aside that alienation, it follows as a consequence that a party who sues to set aside the alienation must obtain a decree. *Sri Prasad c. Raj Guru Triambuknath Deo*—vi, 555.

18. According to *Sadabart Prasad Sahu v. Foolbush Koer*, a sale of undivided ancestral property by a father without any legal necessity and without the consent of all the co-sharers, is, under the Mitakshara law, invalid. It is not valid even as regards the father's share. A son suing to set aside such an alienation is, according to that case, entitled to a declaration that the alienation is void altogether. The son suing in the father's life-time on behalf of the family may be entitled to a decree for possession. Upon what terms that decree should be made, will, according to the decision in *Modhoo Dyal Singh v. Kolbar Singh* (Sup. Vol. 1018), depend on the equity which the purchaser may have to a refund of the purchase-money, or to be placed in the position of an encumbrancer as against the joint family in the particular case. *Hanuman Dutt Roy v. Kishen Kishor Narayan Singh*—viii. F. B. 358.

## PRIVY COUNCIL.

*The 6th July, 1877.*

## PRESENT :

Sir J. W. Colville, Sir B. Peacock, Sir M. E. Smith, and Sir R. P. Collier.

LEKHRAJ ROY\* and others, ... .. (Plaintiffs.)

*versus*

KUNHYA SINGH and others, ... .. (Defendants.)

*Construction, Rules of—Grant for an Indefinite Period.*

The rule of construction that a grant made to a man for an indefinite term endures only for the life of the grantee and passes no interest to his heirs, does not apply in cases where the term can be definitely ascertained by reference to the interest which the grant or himself has in the property, and which the grant purports to convey.

This was an appeal against a judgment and decree of the Calcutta High Court, dated the 4th April, 1872 (1), by which an application made by the appellants for admission of a review of a judgment of the said Court passed on the 23rd June, 1871 (2), was dismissed.

The only question arising on this appeal was as to whether, under a lease of certain lands granted to the father of the respondent, Kunhya Singh, by one Choonee Lall, through whom the appellants claim, there passed to the lessee merely an interest for his own life, as contended by the appellants, or one which was to continue as long as the tenure of the lessor, as contended for by the respondents.

Mr. Leith, Q. C., and Mr. Doyne, appeared for the appellants.

Mr. Cowie, Q. C., and Mr. John Cutler, for the respondents.

The material circumstances of the case will appear from their Lordship's judgment, which was delivered by

SIR M. E. SMITH.—This suit was brought by the present appellants to obtain possession of an eight-anna share of Mouza Toee, and the plaint also prays for the annulment of the mokurari tenure which the respondents claimed to have in the mouza under a potta granted by one Choonee Lall. The appellants are the purchasers under a decree obtained against some persons who had become possessed of part of the interest of Choonee Lall in the eight-anna share of the mouza. The respondents are the heirs of Nirput Singh, who was the grantee under the potta. The single question in this appeal is, whether, upon the true construction of this potta, and upon the evidence in the case, the grant

\* Vide Indian Law Reports, 3, Calcutta Series, p. 210.

(1) 18, W. R., 494.

(2) 14, W. R., 262.

was one to endure for the life of Nirput Singh only, or whether it was to endure so long as the interest of Choonee Lall existed. That involves also an inquiry into what the interest of Choonee Lall was.

The lease or potta in question is dated in April, 1808, and the material parts of it are in these terms: "The engagements and agreements of the potta on the kabulyat of Nirput Singh, lessee of Mouza Toee, Pergunna Malda, Zilla Behar, are as follows: Whereas I have let the entire rents of the mouza aforesaid,"—describing what he had let,— "at an annual uniform jumma of Sicca Rs. 606, without any condition as to calamities, from the beginning of 1215 Fusli to the period of the continuance of my mukurari." That is the term fixed in the potta. It is a term "from the beginning of 1215 Fusli to the period of the continuance of my mukurari." Then it is required that the lessee should cultivate, "and pay into my treasury the sum of Sicca Rs. 606, the rent of the mouza aforesaid, for the period aforementioned, according to the instalments, year after year." Then there is this provision, "if, hereafter the authorities desire to make a settlement of the property at that time, he shall pay the jumma thereof separately according to the Government settlement." It concludes, "hence these few words are written and given as a potta, to continue during the term of the mukurari, that it may be of use when required. "The annual jumma mal-guzari, including the malikana, Rs. 606."

To ascertain what is the term granted by this potta, we must see, in the first place, what is the interest which the grantor Choonee Lall had. He calls it a mukurari interest; but whether it be a true mukurari interest or not, it was evidently the intention of the parties that the grant should endure during term of his interest. If it can be ascertained definitely what that term is, the rule of construction that a grant of an indefinite nature enures only for the life of the grantee would not apply. If a grant be made to a man for an indefinite period, it enures, generally speaking, for his life-time, and passes no interest to his heirs, unless there are some words showing an intention to grant an hereditary interest. That rule of construction does not apply if the term for which the grant is made is fixed or can be definitely ascertained.

Now it appears that as early as 1788 the Government granted what has been called a mukurari lease to Mahomèd Bukah, and that lease, after various intermediate assignments, was ultimately purchased by Choonee Lall, the grantor of the potta in question. Choonee Lall is said to have purchased it in 1807 or 1808. It is also said that he



had purchased the proprietary interest in two annas of the mouza. From the document which has been produced from the Collector's office, other persons appear to have been proprietors of the remaining annas, but nothing is heard of them in this suit. However that may be, it does not really affect the present question, because the interest pointed at in the potta in question is a mukurari interest. The kabulyat of the lease of 1788, signed by Mahomed Buksh, is as follows:—"Whereas I have obtained a lease of Mouza Toee, Zilla Kosra, Pergunna Malda, the area whereof, by estimation, is 709 bigas 10 cottas, from 1196 (one thousand one hundred and ninety-six) Fusli, at a jumma of Sicca Rs. 400"—with certain exceptions—"I do acknowledge and give in writing that I shall continue to pay the rent of the mouza aforesaid at the said jumma, year after year, according to the kabulyat and the kistbundi. If any one establish his zemindari (proprietary) right in respect of the said mouza in his own name before the authorities, I shall continue to pay, year after year, to him or his heirs, the 'malikana' (proprietary allowance) thereof at the rate of Rs. 10 per cent. on the jumma aforesaid, in addition to the Government revenue." The lessee is to pay a jumma of Rs. 400 and a malikana of 10 per cent. on the jumma. Of course, if Mr. Leith is right that Choonee Lall became the owner of the proprietary interest, the malikana would go into his own pocket. Then at the end there is this clause, which has given occasion to considerable discussion: "If the present officers of the British Government, or any authority who may come hereafter, do not accept my mukurari lease to be hereditary, I acknowledge that this kabulyat is only for one year, thereafter it shall be cancelled." That, undoubtedly, acknowledged a power in the Government to put an end to this lease, which is called a mukurari lease, at the end of one year. But it appears that the Government have not done so. It may be that it was contemplated that the Government would settle in the ordinary way with the proprietors for the revenue, and in that case would put an end to this mukurari. But it appears that no settlement has been made, and that this lease has been allowed to go on without being put an end to; and although, if it not perhaps properly a mukurari, inasmuch as practically the Government could enhance the rent, it must be regarded, as long as it goes on, as an hereditary lease, a mourasi potta. This being the interest of Choonee Lall (he having become the purchaser of this potta), he grants this lease to Nirput Singh to endure during the continuance of it. That interest, which continues, and has not been determined by the British Govern-

ment, being an hereditary interest, there seems to be no reason why, upon the construction of the potta in question, it should be held to be limited to the life of Nirput Singh. As already observed, the duration of the term is capable of being definitely ascertained by reference to the interest which the grantor himself has in the property.

Their Lordships think that this case may be decided upon the construction of the document, and that it is not necessary to have recourse to the exposition of it to be derived from the conduct of the parties. It is satisfactory, however, to find that the view which has been taken by their Lordships of the construction of this document is that which the parties themselves evidently entertained, because for twelve years after Nirput Singh's death his heirs were allowed to remain in possession of the property precisely in the same way in which he had held it, paying the same rent.

Their Lordships agree with the judgment of the High Court given upon review, and they will humbly advise Her Majesty to affirm that judgment, and to dismiss this appeal with costs.

#### DIRECTIONS TO READERS.

*Note* that the case of *Forester vs. The Secretary of State*, reported in the Indian Law Reports, Calcutta Series, p. 161 (Copy for March, 1878) was reported in 5, Legal Companion, p. 270 (Copy for October, 1877), and that the case of *Lungessur Kooer vs. Sookha Ojha*, reported in the Indian Law Reports, Calcutta Series, p. 151 (Copy for March, 1878) was reported in 5, Legal Companion, p. 311 (Copy for November and December, 1877).

*Note* that the case of *Deen Dyal vs. Jugdeep Narain Singh*, reported in the 6, Legal Companion, p. 31 (Copy for January, 1878) has been reported in I. L. R., 3, Cal. Series, p. 198, (Copy for April, 1878); and that the case of *The Administrator General of Bengal vs. Juggeswar Roy*, reported in 5, Legal Companion, p. 334, (Copy for November and December, 1877) has been reported in the I. L. R., 3, Cal. Series, p. 192, (Copy for April, 1878;) and that the case of *Partchal vs. Zalim Sing*, reported in the 5, Legal Companion, p. 199 (Copy for June, 1877) has been reported in I. L. R., 3, Cal. Series, p. 214 (Copy for April, 1878).

*Note* also that the Judgment of the Full Bench of the Calcutta High Court in the case of the *Empress vs. Burah and Bock Singh*,

reported in I. L. R., 3, Calcutta Series, p. 63, (the Copy for February, 1878) has been reversed by the Privy Council by their judgment of the 5th June, 1878.

## SHORT NOTES.

### PRIVY COUNCIL.

#### *Hindu law of succession—Co-widows.*

According to the Hindu law of inheritance the separate property of a person dying without male issue, and leaving more than one widow, is taken by all the widows as a joint estate for life, with rights of equal beneficial enjoyment and of survivorship.

The view that, according to the custom prevailing in Southern India, the senior widow by date of marriage succeeds in the first instance, the others inheriting in their turn as they survive, but being only entitled in the meantime to be maintained by the first, is not supported by the decisions of the Courts, nor by the sanction of any text writer of paramount authority in the Madras Presidency.

Widows who take a joint interest in the inheritance of their husband have no right to enforce an absolute partition of the estate between themselves. But where, from the conduct of one or more of their number, separate possession of a portion of the inheritance is the only likely means to secure for each peaceful enjoyment of an equal share of the benefits of the estate, an order for separate possession and enjoyment may be made.

*Jijoyiamba Bayi Saiba v. Kamacki Bayi Saiba* (3, Mad. H. C. Rep., 421) referred to and approved.

*Vide* I. L. R., 1, Madr. Series, 290. *Gajapathi Nilamoni vs. Gajapathi Radhamani*.

#### *The Indian Registration Act VIII. of 1871.—Construction of s. 35—Non-compliance with provisions of.*

The words of s. 35 of the Indian Registration Act, VIII. of 1871, which provide that "If all or any of the persons by whom the document [*i. e.*, the document presented for registration] purports to be executed deny its execution, or if any such person appears to be a minor, an idiot, or a lunatic, or if any person by whom the document purports to be exe-

ated is dead and his representative or assign denies its execution, the registering officer shall refuse to register the document," taken literally, seem to require the registering officer to refuse registration of a deed which purports to be executed by several persons if any one of them deny execution, or appear to be a minor, an idiot or a lunatic.

Since such a construction would cause great difficulty and injustice and would be inconsistent with the language and tenor of the rest of the Act, the words in question must be read distributively, and construed to mean that the registering officer shall refuse to register the document *quoad* the persons who deny the execution of the deed, and *quoad* such persons as appear to be under any of the disabilities mentioned.

The registration of a deed is not necessarily invalid by reason of a failure on the part of the registering officer to comply with the provisions of the Registration Act.

*Sah Mukhun Lall Panday v. Sah Koondun Lall* (15, B. L. R., 228; 24, W. R., 75; L. R., 2, Ind. App., 210) referred to and approved.

*Vide* I. L. R., 1, All. Series, p. 465. *Muhammad Ewaz vs. Birj Lal*.

### CALCUTTA HIGH COURT.

*Principal Surety—Accommodation Acceptor—Discharge of Surety—Equitable Mortgage—Trust Deed for benefit of Creditors—Eventual Remedy of Surety—Contract Act (IX. of 1872), ss. 132, 134, 135, 139—Evidence Act (I. of 1872), s. 92.*

In the years 1870 and 1873 *A* drew certain bills of exchange upon *B*, which were accepted by *B* for the accommodation of *A*, and endorsed by *A* to the Bank of Bengal. In May, 1876, *A*, by letter, agreed to execute a mortgage of a certain portion of his property, consisting of a share in a Privy Council decree, to *B*; and in the meantime to hold such property at the disposal of *B*, his successors and assigns. In the month of June, 1876, *A* became unable to meet his liabilities, and in the month of August following executed a conveyance of all his property to the Official Trustee upon trust for the benefit of *A*'s creditors. The Bank assented to and executed this deed after it had been assented to and executed by some of the other creditors. The deed did not contain any composition with or release by the creditors, nor any covenant on their part not to sue *A*. In a suit by the Bank against *B*, as acceptor of the bills—

*Held*, that *B* was not precluded by the provisions of s. 132 of the Contract Act and s. 92 of the Evidence Act from pleading that he was an accommodation acceptor only ; but

*Held*, that the letter of May, 1876, constituted a good equitable mortgage, and that *B* was not thereafter entitled, as against the Bank, to the equitable rights of an accommodation acceptor.

*Held* further, that the trust deed did not impair the "eventual remedy" of *B*, and that therefore he was not discharged from his suretyship under the provisions of s. 139 of the Contract Act.

*Vide* I. L. R., 3, Calcutta Series, p. 174. *M. Pogose vs The Bank of Bengal*.

### *Hindu Law—Partition—Share of Mother on Partition among Sons—Deceased Son.*

On a partition among her sons, a mother is entitled to obtain a share as representative of a deceased son, as well as one in her own right.

*Vide* I. L. R., 3, Cal Series, p. 149 *Jugomohun Haldar vs. Saradamoyee Dossee*.

### *Title—Adverse Possession—Limitation.*

Twelve years' continuous possession of land by a wrong-doer not only bars the remedy and extinguishes the title of the rightful owner, but confers a good title upon the wrong-doer.

*Semble*.—Such title may be transferred to a third person whilst it is in course of acquisition and before it has been perfected by possession.

Suits for possession distinguished from suits for declaration of a particular title.

Where a plaintiff seeks to recover possession of property of which he has been dispossessed, and bases his claim on the ground of purchase, and also upon the ground of a twelve years' possessory title, he is entitled to succeed if he proves his possession, even if he fails to prove his purchase.

*Vide* I. L. R., 3, Calcutta Series, p. 224. *Gossain Dass Chunder vs. Issur Chunder Nath*.

### *Contract, alteration of, after Signature—Contract Act (IX. of 1872), s. 37.*

To a contract between the plaintiffs and the defendant, for the purchase by the defendant of a cargo of salt, the plaintiffs, after the contract

had been signed by the defendant, added in the margin: "Ten days' demurrage will be allowed at Rs. 250 per diem." *Held*, that the addition of the words in the margin did not amount to an alteration within the rule of English law: the alteration must be either something which appears to be attested by the signature or something which alters the character of the instrument.

*Vide* I. L. R., 3, Cal. Series, p. 220. *Ede vs. Kanto Nath Shaw*.

*Criminal Procedure Code (Act X. of 1872), s. 263—High Court, Power of—Jury, Verdict of Acquittal by.*

Where the Jury acquitted the prisoners on the charges framed, but found certain facts which amounted to another offence, and omitted to convict the prisoners of that offence, as provided by s. 457 of the Criminal Procedure Code,—*held*, that the High Court could, on the case coming before them under s. 263 of the Criminal Procedure Code, find the prisoners guilty of such offence.

*Vide* I. L. R., 3, Calcutta Series, p. 189. *The Empress vs. Harai Mirdha*.

### MADRAS HIGH COURT.

*Suit—Limitation—Act XIV. of 1859 and Act IX. of 1871—Demand.*

The suit was brought on an instrument in the nature of a promissory note payable on demand. The note was executed on 20th November 1871 and the suit was filed on the 17th November 1875. *Held* that the suit not having been brought until after the date at which Sec. 4 of Act IX. of 1871 and its appendix Schedule II. came into operation, the question whether the suit was barred or not by the law of limitation must be determined by Schedule II. of that enactment, which gives three years from date of demand.

*Held* also that the suit was not barred, there being no suggestion of any demand having been made before the suit was instituted.

*Vide* I. L. R., 1, Mad. Series, p. 301. *Madhavan vs. Achuda*.

*Sudra—Illegitimate son—Maintenance.*

The illegitimate son of a Sudra, his mother having been a married woman at the time of her forming an adulterous connexion with his father, is entitled to maintenance out of his father's estate.

*Vide* I. L. R., 1, Mad. Series, p. 306. *Vuaramuthi Udayan vs. Singaravelu*.

## BOMBAY HIGH COURT.

*Act VIII. of 1859, Sections 273 to 281—Act X. of 1872, Sections 3, and 223 to 343—Act I. of 1868, Section 6—Construction—Procedure—Retrospective enactment—Judgment-creditor—Judgment-debtor—Decree—Execution—Imprisonment for debt—Discharge from arrest.*

*Held*, by a majority of the full Bench, (Sargent and Bayley, JJ., dissenting,) that a judgment-debtor, imprisoned in satisfaction of the decree against him under Act VIII. of 1859, is not entitled, under Act X. of 1877, to be released on the coming into operation of the latter Act, if he have then been imprisoned for more than six months but less than two years.

*Per* WESTROPP, C. J.—The judgment-creditor has, under Act VIII. of 1859, the right (subject to be divested only under the circumstances stated) to have such judgment-debtor as the above detained in custody for two years unless he in the meantime fully satisfy the decree. Chapter XIX. of Act X. of 1877, sub-division I., is essentially prospective throughout. Section 342 must, therefore, be construed as relating only to future imprisonment, consequent on arrests to be made under Act X. of 1877. There is not in Chapter XIX. of that Act any trace of an intention on the part of the Legislature to deal with imprisonment commenced before the coming into force of the Act. Notwithstanding the repeal of Act VIII. of 1859 by Act X. of 1877, Act I. of 1868, section 6, saves the committal under Act VIII. of 1859, while that Act was in force, of a judgment-debtor, and also his consequent detention, commenced before the coming into force of Act X. of 1877, if such detention is to be regarded as "procedure." The effect of Act I. of 1868, section 6, and Act X. of 1877, section 3, taken in combination, is to remove from the scope of the latter Act all proceedings after decree initiated before its coming into force, and then still pending, and to leave within its range all proceedings after decree initiated after its coming into force, though the suits and decrees, in and under which such last-mentioned proceedings may be taken, were commenced and made before Act X. of 1877 came into force. Therefore; assuming the rule as to the retroactive force of enactments relating to procedure laid down in *Wright v. Hale* (8 H. & N. 227) to apply, still section 342 of Act X. of 1877 is not retrospective. But the question raised by the present application being one not merely of procedure, but of the divestment of the existing right of the judgment-creditor, the presumption is, (in the absence of

express legislation, or direct implication to the contrary,) against giving retroactive force to section 342 of Act X. of 1877. The cases relating to questions of mere procedure, whereby a retroactive force has been given to enactments, reviewed, and distinguished from those by which no such force was given, by reason of their raising questions which affected vested rights.

*Per* SARGENT, J.—Sections 1 and 3 of Act X. of 1877, taken in connexion with Act I. of 1868, section 6, show that, whilst saving all acts already done in execution of a decree in a suit instituted before Act X. of 1877 came into force, all matters of procedure in execution subsequent to that date should be determined by the Act itself. The question raised by the present application is one of procedure, for the conditions and period under and for which the writ of imprisonment remains in force are as much matters relating to procedure as the issuing of the writ. Neither the wording of section 342 or the heading to Chapter XIX. of Act X. of 1877 necessarily confines the “imprisonment,” therein referred to, to imprisonment commenced since that Act came into force. Though the judgment-creditor, by the arrest and imprisonment of his debtor, acquires a right different from the mere right of a plaintiff to have his cause of action tried according to a certain procedure, yet the rule that an Act is not to be construed retrospectively so as to defeat an existing right, is only a rule of construction, and must yield to the intention of the Legislature. It is difficult to suppose that the Legislature, when introducing a benign change into the law of debtor and creditor, in harmony with modern legislation, could have intended that two laws should continue for the next two years to operate concurrently, and that debtors imprisoned on the day before the latter Act came into force should be liable to be detained under the severer enactment.

*Per* BAYLEY, J.—Cases on the construction of statutes relating to procedure reviewed. History of imprisonment for debt before recent legislation in England, and before the abolition of the Supreme Court in Bombay. The change effected by Act VIII. of 1859 in the relative positions of debtor and creditor pointed out. *Corrie v. Caw* (13 Beng. L. R. 268) is inconsistent with the inviolable right claimed by the judgment-creditor to detain the judgment-debtor for two years. The sections of Act VIII. of 1859, relating to imprisonment for debt and its duration, are concerned with procedure alone. The definitions of “decree” and “judgment-debtor” in Act X. of 1877 are wide enough to



include decrees passed, and judgment-debtors who have become such, before the coming into force of the Act. Sections 341 and 342 of Act X. of 1877 are applicable to proceedings pending when the Act came into force. The Legislature intended that the improvements introduced by the new Code should apply to suits brought under the old Code in those cases in which, consistently with the provisions of the new Code, they might, upon the ordinary principles of the interpretation of statutes, be clearly applicable. Section 3 of Act X. of 1877 implies that the procedure after decree shall be according to the provisions of that Act. *Sumboochunder Haldar* (1 Bourke 69) and *Williams v. Smith* (4 H. & N. 559) distinguished. Section 6 of Act I. of 1868 does not apply in the present case. When of two possible constructions, one is in strict harmony with the improvements introduced by the Act, and with the spirit of modern legislation, while the other treats the point under consideration as not having been considered by the Legislature at all, the former is to be preferred.

*Per GREEN, J.*—Apart from section 1, and the proviso to section 3, there is not, in Act X. of 1877, any provision as to its operation with regard to pending or past proceedings. Section 1 does not alter or abridge the legal effect, after 1st October 1877, of proceedings had and completed before that date; and in construing section 3 regard must be had to Act I. of 1868, section 6, though the general rule of construction contained in the last-mentioned section must yield to the intention of the Legislature expressed in any subsequent Act. The proviso to section 3, coupled with section 1 of Act X. of 1877, shows that the intention of the Legislature was that the repeal of the old Procedure Acts was to affect, to some extent, the procedure, other than that prior to decree, in suits instituted before Act X. of 1877 came into force. Ample effect would be given to this intention, while regard would still be had to section 6 of Act I. of 1868, by holding that in all steps and proceedings, not prior to decree, had and taken after the 1st October 1877 in suits instituted before 1st October 1877, the provisions of the new Code are to be operative. Cases giving a retroactive force to enactments relating only to procedure reviewed and distinguished. The right of an execution-creditor to detain his debtor till satisfaction of the decree for a period not exceeding two years, under a warrant issued before 1st October 1877, by virtue of Act VIII. of 1859, is in no wise affected by the new Code coming into operation.

*Per WEST, J.*—Cases on the retroactivity of enactments reviewed.

Act VIII. of 1859 must have clothed the Court's orders with an abiding validity, and the judgment-creditors with an abiding right, or else with none at all. The ministerial officer is to act on the order of the Court according to its original purport. The order, in the absence of an express provision to the contrary, retains its validity, until it is withdrawn or varied. The new procedure, therefore, does not apply, whether as touching person or property, except, perhaps, in matters of mere administration or provisional arrangement. It cannot, at any rate, apply so as to deprive the creditor of his right once acquired by the arrest of his judgment-debtor in execution. Any change in the relations of the parties can be made only in accordance with the later and existing law, but their previously subsisting relations continue to subsist as before. It is unlikely that the Legislature intended section 342 of Act X. of 1877 to apply to cases of imprisonment other than those arising under that Act. Section 342 is simply a negative provision, and the affirmative provisions with which it is to be read are to be found in the same chapter of the Act, and these can only be applied to cases arising after the Act has come into force. The close of the litigious transaction, like that of a contractual one, fixes the rights of the parties according to the then existing law, and in principle there is no distinction between a construction prejudicial to the debtor and a construction prejudicial to the creditor. The imprisonment under Act VIII. of 1859, as a "proceeding commenced," comes within the scope of section 6 of Act I. of 1868. Act VIII. of 1859, therefore, and not Act X. of 1877, governs the enforcement of the judgment-creditor's decree throughout the proceedings consequent on his application for the debtor's imprisonment under the former Act. If the present application for discharge be a proceeding commenced since the new Act came into force, it is not integral with the previous proceedings in execution. If, on the other hand, it is integral with them, it is part of a proceeding commenced before the new Act came into force. In neither case can it bring within the new Act orders deriving their validity from another law.

*Vide I. L. R., 2, Bom. Series, p. 148. In the matter of the petition of Ratansi Kalianji and others.*

#### HIGH COURT, N. W. P.

*Act XXXV. of 1858, s. 9—Act XIX. of 1873 (North-Western Provinces and Revenue Act), ss. 194, 195—Lunatic—Court of Wards.*

S. 9 of Act XXXV. of 1858 and s. 195 of Act XIX. of 1873 do not render it imperative on the Court of Wards to take charge of the estate

of a person adjudged by a Civil Court, under Act XXXV. of 1858, to be of unsound mind, but merely confer on that Court a power so to do. Until the Court of Wards exercises that power, the appointment by the Civil Court of a manager of the lunatic's property, under s. 9 of Act XXXV. of 1858, is valid.

*Vide* I. L. R., 4, All. Series, 476. *Manohar Lall vs. Gauri Shankur.*

*Contract - Consideration - Immoral Consideration - Void Agreement - Act IX. of 1872 (Contract Act), ss. 23, 25.*

*M* had for many years lived with *G* as his concubine. In consideration of such past cohabitation, *G*, by an agreement in writing dated the 28th March, 1869, and duly registered, settled an annuity on *M*, charging a portion of his real estate with the payment of such annuity. *Held*, in a suit by *M* against *G*'s heir, his married wife, to enforce the agreement, that the consideration for the agreement was not, under the law then in force immoral, nor was the agreement, under the same law, void for want of consideration. *Held* also that, before *M* could recover from the defendant on the agreement, it was necessary to show that the defendant had received funds available to meet the claim from the profits of the estate charged with the payment of the annuity or other property of *G*.

*Vide* I. L. R., 1, All. Series, p. 478. *Man Kuar vs. Jasodha Kuar.*

*Res judicata—Act VIII. of 1859 (Civil Procedure Code), ss. 2, 139—Trial and Determination of Issues.*

A Court of competent jurisdiction, having tried and determined an issue arising in a suit on which the suit might have been disposed of, proceeded to try and determine another issue which also arose out of the pleadings, but the determination of which in that suit was not required for its disposal. *Held* that such Court was not bound under the circumstances to refrain from trying and determining such last-mentioned issue, and that the trial and determination of it could not be treated as a nullity, and the issue could not again be tried and determined in another suit.

*Vide* I. L. R., 1, All. Series, p. 480. *Man Singh vs. Narayan Dass.*

*Muhammadian Law—Dower—Conjugal rights—Act VI. of 1871 (Bengal Civil Courts' Act), s. 24.*

When a Muhammadan sues wife for restitution of conjugal rights, such suit is to be determined with reference to Muhammadan law (see also *Buzloor Raheem v. Shunsoonnissa*, 8 W. R., P. C., 3; S. C., 11 Moore's Ind. Ap. 551; in which the Privy Council held, under the law corresponding to s. 24 of Act VI. of 1871, that a suit by a Muhammadan for restitution of conjugal rights must be determined with reference to Muhammadan law) and not with reference to the general law of contract. Under Muhammadan law, if a wife's dower is "prompt," she is entitled, when her husband sues her to enforce his conjugal rights, to refuse to cohabit with him, until he has paid her dower, and that notwithstanding that she may have left his house without demanding her dower and only demands it when he sues, and notwithstanding also that she and her husband may have already cohabited with consent since their marriage. *Abdool Shukkoar v. Raheemoonnissa* (H. C. R., N. W. P., 1874, p. 94. As to the general power of a wife to refuse herself, see *Jaun Beebee v. Beparee*, 3 W. R., 93, where presumably the wife's dower was prompt) followed.

When, at the time of marriage, the payment of dower has not been stipulated to be "deferred," payment of a portion of the dower must be considered "prompt." The amount of such portion is to be determined with reference to custom. Where there is no custom, it must be determined by the Court, with reference to the status of the wife and the amount of the dower.

Where a Court, following this rule, determined that one-fifth only of a dower of Rs. 5,000 not stipulated to be "deferred" must be considered "prompt," inasmuch as the wife had been a prostitute and came of a family of prostitutes it exercised its discretion soundly.

*Vide* L. L. R., 1, All. Series, p. 483. *Eidan vs. Mazhar Husain*.

*Act IX. of 1872 (Indian Contract Act), s. 127, illustration (c)—Surety. Bond—Void Contract—Want of consideration.*

Where *N* advanced money to *K* on a bond hypothecating *K*'s property, and mentioning *M* as surety for any balance that might re-

main due after realization of *K*'s property, *M* being no party to *K*'s bond but having signed a separate surety bond two days subsequent to the advance of the money, *held* that the subsequent surety-bond was void for want of consideration under s. 127 of the Indian Contract Act (IX. of 1872.)

*Per* STUART, C. J.—The legal position of the surety considered and determined.

*Per* STUART, C. J.—Remarks on the legal character of the “illustrations” attached to Acts of the Indian Legislature, and opinion expressed that they form no part of these Acts.

*Vide* I. L. R., 1, All. Series, p. 487. *Nanak Ram vs. Mehin Lall.*

*Conditional Sale—Mortgage—Foreclosure—Regulation XVII. of 1806, s. 8.*

Where land which has been conditionally sold is subsequently mortgaged, the second mortgagee, being the mortgagor's “legal representative,” within the meaning of that term in s. 8. of Regulation XVII. of 1806, is entitled on foreclosure proceedings being taken by the conditional vendee to the notice required by that section, and cannot be deprived by the condition vendee of the possession of the land notwithstanding foreclosure, where no such notice has been given to him.

*Vide* I. L. R., 1, All. Series, 499. *Durga Singh vs. Debi Singh.*

*Decree for the Performance of a Particular Act—Execution of Decree—Act VIII. of 1859 (Civil Procedure Code), s. 200.*

*A*, who had been directed by a decree to refrain from preventing her daughter returning to her husband, after the date of the decree permitted her daughter, who was of age, to reside in her house. *Held* that such conduct on the part of *A* was no such evidence of interference with her daughter's return as would justify the execution of the decree against her, under the provisions of s. 200 of Act VIII. of 1859.

*Vide* I. L. R., 1, All. Series, p. 501. *Ajnasi Kuar vs. Sursaj Prasad.*

*Hindu Law—Hindu Widow—Forfeiture—Reversioner.*

A Hindu widow does not forfeit her interest in her deceased husband's separate estate merely by divesting herself of such interest. Such an act does not entitle the person claiming to be the next rever-

sioner to sue for possession of the estate, or for a declaration of his right as such reversioner to succeed to the estate after the widow's death.

*Vide* I. L. R., 1, All. Series, p. 503 *Prag Das vs Hari Kissen.*

### *Muhammadian Law—Dower.*

Under Muhammadian law, when on marriage it is not specified whether a wife's dower is prompt or deferred, the nature of the dower is not to be determined with reference to custom, but a portion of it must be considered prompt. The amount to be considered prompt must be determined with reference to the position of the wife and the amount of the dower, what is customary being at the same time taken into consideration. *Eidan v. Mazhar Husain* (I. L. R., 1, All., p. 483) followed.

*Vide* I. L. R., 1, All. Series, 506 *Taufik-un-nissa vs. Ghulam Kambar.*

### *Execution of Decree—Special Appeal—"Final Decree of Appellate Court"* —*Limitation—Act IX. of 1871 (Indian Limitation Act), sch. ii., art. 167.*

The Munsif gave the plaintiffs in a suit for possession of land and for mesne profits a decree for possession but dismissed the claim for mesne profits. An appeal was preferred to the Judge, who affirmed the decree for possession and remanded the case to the Munsif, under s. 351 of Act VIII. of 1859, to determine the mesne profits due to the plaintiffs. The Munsif gave the plaintiffs a decree for certain mesne profits. Subsequently a special appeal was preferred to the High Court against the Judge's decree. While this was pending an appeal was preferred to the Judge against the decree of the Munsif for mesne profits, and on the 7th June, 1873, the plaintiff again obtained a decree for mesne profits. Finally, on the 6th March, 1874, the High Court modified the Judge's decree for possession but did not interfere with the order of remand. *Held*, on the plaintiffs applying for execution of the Judge's decree, dated the 7th June, 1873, that the limitation for the execution of such decree ran not from the date of such decree but from the date of the High Court's decree, which was "the final decree of the Appellate Court," and the only "final decree," within the meaning of art. 167, sch. ii. of Act IX. of 1871.

*Vide* I. L. R., 1, All. Series, p. 508. *Ismam Ali vs. Dassandhi Ram.*

*Decree made in favour of a firm in name of Agent—Applications for Execution made by Agent other than Agent named in the decree—Effect of such Applications to keep the Decree in force—Limitation—Act IX of 1871 (Indian Limitation Act), sch. II., art. 167.*

A decree was passed in favour of a firm in the name of an agent of the firm. The second and subsequent applications for execution were made by an agent of the firm other than the agent named in the decree. Certain persons, alleging that they were the proprietors of the firm, applied for execution of the decree. The application was refused on the ground that the proceedings in execution taken by the last-mentioned agent were invalid and execution of the decree was therefore barred by limitation. *Held* that such proceedings, however irregular, were not invalid.

*Vide* I L R, 1, All Series p 510 Lachman Dadas Pataniam.

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**CALCUTTA HIGH COURT.**

*The 18th June, 1878.*

**FULL BENCH.**

Before the Hon'ble Sir Richard Garth, *Kt.*, *Chief Justice*, and the Hon'ble Mr. Justice Jackson, Mr. Justice Markby, Mr. Justice R. C. Mitter, and Mr. Justice W. Ainalie, *Judges*.

*Appeals from orders in the execution of a decree—Proceedings and procedure defined—Decree—Section 6 of Act I. of 1868 and Section 16 of the Letters Patent of 1865—Sections 3 and 591 of Act X. of 1877.*

Case No. 360 of 1877.

**RUNJIT SINGH and others, Judgment-debtors, Appellants,**

*versus*

**MEHERBAN KOER and others, Decree-holders, Respondents.**

*Babu Nogendro Nath Roy, for Appellants.*

*Babus Kally Kishen Sen and Joy Gopal Ghose, for Respondents.*

Case No. 323 of 1878.

**SURENDRO NATH PAL CHOWDHRY and others, Decree-holders, Appellants,**

*versus*

**CHUNDER CUMAR ROY and others, Judgment-debtors, Respondents.**

*Babus Kally Mohun Dass and Bhowany Charan Dutt, for Appellants.*

*Mr. Bell, Babus Unnoda Pershad Banerji and Bungshidhur Sein, for Respondents.*

Case No. 2 of 1878.

**RAJ CUMARI DABI CHOWDHRAIN, Judgment-debtor, Appellant,**

*versus*

**MISSURAM MONDUL, Decree-holder, Respondent.**

*Babu Sree Nath Dass, for Appellant.*

*Babu Guru Das Banerji, for Respondent.*

Case No. 26 of 1878.

**HARAN CHUNDER CHUCKERBUTI, Judgment-debtor, Appellant,**

*versus*

**RAKHAL CHUNDER ROY CHOWDHRY and others, Decree-holders, Respondents.**

*Babu Troylukho Nath Mitter, for Appellant.*

*Babu Doorga Mohun Das, for Respondents.*



## Case No. 27 of 1878.

OMUR ALI KHAN and others, Judgment-debtors, *Appellants*,

*versus*

MAHOMED SABIR, Decree-holder, *Respondent*

*Babu Nogendro Nath Roy*, for Appellants.

*Babu Juggut Doorlub Bysack*, for Respondent.

## Case No. 30 of 1878.

KHUNDKAR MAHOMED TOWSICAL ISLAM, Judgment-debtor, *Appellant*,

*versus*

AMIRUNNISSA BIBI, Decree-holder, *Respondent*.

*Babu Rajendra Nath Bose*, for Appellant.

*Babu Kishory Mohun Roy*, for Respondent.

## Case No. 33 of 1878.

SAHARAM ROY, Judgment-debtor, *Appellant*,

*versus*

SIRMONT CHUCKERBUTTY, Decree-holder, *Respondent*.

*Babu Bhowany Churn Dutt*, for Appellant.

*Babu Grish Chunder Chowdhry*, for Respondent.

## Case No. 48 of 1878.

SRINATH BANERJI, Judgment-debtor, *Appellant*,

*versus*

TROILOKHO NATH BISWAS, Decree-holder, *Respondent*.

*Babu Juggut Chunder Banerji*, for Appellant.

*Babu Srinath Dass*, for Respondent.

Under the new Civil Procedure Code (Act X. of 1877) no appeal lies from any order passed by any Court in the exercise of its original or appellate jurisdiction except as provided in Chapter XLIII. of the Act. But this provision is prospective and applies only to orders made under the new Code. Where therefore the proceedings in execution had commenced before the new Code came into operation, there they would go on as before, including a special appeal, if the old Code allowed one.

*Per Chief Justice and Justice Jackson.* A suit is a judicial proceeding and the words "any proceedings" in section 6 of Act I. of 1868 (General Clauses Act) include all proceedings in any suit from the date of its institution to its final disposal, and therefore they include proceedings in appeal. By the above section therefore, the right of special appeal is saved in all cases where the proceedings taken in the execution of a decree had commenced before the new Code came into force.

*Per Justices Markby, Ainslie and Mitter.* Under section 16 of the Letters Patent of 1865, the High Court is empowered to hear appeals, and therefore an appeal lies to it against any order of the Lower Court, if at the time the order was made, the right of appeal was not repealed.

GARTH, J. C.—I think that the special appeal in this case is preserved to the appellant by Section 6 of Act I. of 1868, which is in these words:—

“The repeal of any Statute, Act or Regulation, shall not affect any proceedings commenced before the Repealing Act shall have come into operation.”

It was held by a Full Bench of the Bombay High Court in the case of Ruttun Chand Shrichand *versus* Haninandra Shrivakas, VI. Bombay High Court Reports, page 166, that a suit is a judicial proceeding, and that the words “any proceedings” in the above section included all proceedings in any suit from the date of its institution to its final disposal, and therefore included proceedings in appeal.

I quite agree in that view of the section. This suit was instituted before the new Civil Procedure Code came into operation; and I consider, that by force of the above section, the proceedings in this suit, including the special appeal, which is an essential part of those proceedings, are to go on to the final end of the suit, notwithstanding the repeal of the old code.

There is nothing in the new code, as far as I can see, which militates against this view.

Section 3 certainly provides, that “nothing contained in the new code shall affect the procedure prior to decree in any suit instituted before that code comes into force”; and the reasonable inference from these words is, that the new code is to affect the procedure *after decree* in any such suit.

But I do not read the word “procedure” in this section as meaning the same thing as the word “proceedings” in Section 6, Act I. of 1868.

The proceedings in any suit commenced before the new code comes into operation, are to go on as before, including a special appeal, if the old code allowed one; but the “procedure” which I understand to mean the machinery by which those proceedings are conducted, is, after decree, to be that which is provided by the new code.

If there is no machinery provided by the new code in case of a special appeal like the present, the old machinery must be used.

I am aware, that in a case of Ramji Bomanji *versus* Hormarji Barjori, 3 Bombay High Court Reports, p. 49, the word “procedure” is used by Sir R. Couch in a more extended sense; but the decision in

that case did not depend as it seems to me, upon the meaning of the word "procedure."

The question there was, whether by the Charter of 1865, the right of appeal to the High Court, which was given by the previous Charter of 1862, was taken away; and (whether that was or was not properly called an alteration in the procedure), the Court held, and I think very properly, that the right of appeal to the High Court was taken away by the Charter of 1865.

At the time when that case was decided, Act I. of 1868, the General Clauses Act, had not been passed; and therefore the effect which Section 6 of that Act, might have upon proceedings in any pending suit, was not considered.

The only other provision in the new code, to which I think it necessary to refer, is Section 591, which enacts, that "except as provided in Chapter XLIII., no appeal shall lie from any order passed by any Court in the exercise of its original or appellate jurisdiction." But this provision appears to be clearly prospective. The appeals allowed by Chapter XLIII. are only appeals from orders made *under the new code*; and the whole of the chapter as it seems to me, is intended to apply only to *future orders* to be made under the new code.

I am therefore of opinion that this appeal should be admitted.

This decision will govern the other cases numbered 2, 26, 27, 33, and 48 of 1878, which are also referred to us, and which depend upon the same principle.

In all the above cases therefore I consider that the appeals should be admitted.

In No. 323 of 1877, no appeal would have been allowed under the old code; and as the new code does not confer any right of appeal in such a case, the appeal must be dismissed with costs.

JACKSON, J.—The difficulty in these cases generally has arisen from the repeal of the Act under which they would have been cognizable, without the simultaneous enactment of any provision saving the right of appeal; and it has been proposed to get over the difficulty by putting some force on the word "decree" as defined in the code. A good deal of discussion has also arisen upon the terms of the last clause of Section 3.

The appeal given by Section 588 of the present code applies to orders made under the code and to no others, and the finality given by

the same section to appellate decisions of that nature is confined to orders passed in appeals under that section.

The word "decree" cannot, in my opinion, include orders, either original or appellate, upon matters arising in the course of a suit or in execution of the decree.

The decision of the Appellate Court on an appeal from the original decree is in truth the result of the decision of the suit by that Court, and therefore comes at once within the definition of a "decree."

The judicial proceedings referred to in the same definition are, I think, those provided for in Section 647, and are altogether outside regular suits.

To adopt any other interpretation and to hold that judicial proceedings in the definition clause include proceedings in a suit before or after decree, would be, in my opinion, to introduce needless and extreme confusion into the provisions of the code.

The difficulty created by Section 3 arises mainly from the use of the ambiguous word "procedure" which evidently has two senses and is employed in this very code sometimes in one and sometimes in the other sense. In one of the two, it includes all the remedies or modes of relief to which a suitor is entitled, and in the other it denotes merely the steps which are to be taken by the Court or its officers in ascertaining the rights of litigants, in putting them into possession of that which is found to be their due, in conducting its own proceedings or enforcing its own decisions. The embarrassment which has arisen entirely disappears if we limit the word "procedure" to that meaning which, I apprehend, it was intended to bear and generally does bear in most places where it occurs in the code, *viz.*, the rules of practice whereby "rights are effectuated through the successful application of the proper remedies." I conceive that the code is chiefly meant to contain as complete a collection as possible of those rules, and that although we find in it here and there declarations as to those cases in which appeals shall or shall not lie, this is done for the sake of convenience and not because those provisions form a part of procedure strictly so called. Those declarations govern the cases to which they are expressly applicable, and as to other cases they will depend either on the words of actual preservative enactments, or on the general principles applicable to the retrospective force of Statutes. If this be so, it follows that the last clause of Section 3 taken by itself has really no effect upon this question, but

relates only to the application of the rules of practice contained in the code. We cannot, I think, nor is it necessary that we should, rely for the purposes of this case on Clause 16 of the Letters Patent of 1865. In the first place it seems to me that the 16th Clause only gave jurisdiction in the sense of enabling the High Court to try the appeals lawfully coming before it, which is, in my opinion, a very different thing from an enactment conferring on the subject a right of appeal. But in the second place, by the 44th Clause, which only gives effect to Clause 9 of the Statute 24 and 25 Vict., the Letters Patent are expressly made subject in all particulars to the legislative powers of the Governor-General in Council, and subsequently the Indian Legislature has by Act VI. of 1871 declared in Section 21 that "appeals from the decrees and orders of District Judges and Additional Judges shall, when such appeals are allowed by law, lie to the High Court." And by Section 22 that "appeals from the decrees and orders of Subordinate Judges and Munsiffs shall, when such appeals are allowed by law, lie to the District Judge, except where the amount or value of the subject-matter in dispute exceed Rs. 5,000, in which case the appeal shall lie to the High Court." That the limiting words "when such appeals are allowed by law" extend to the latter part of the sentence I cannot doubt, either on grounds of grammatical construction, or with reference to the reason of the thing; and thus by the enactment of a competent Legislature the power of hearing appeals given to the High Court is expressly restricted to those cases in which an appeal is allowed by any law in force. But even without this express enactment the result in my opinion would have been the same. I have already observed on what seems to me the distinction between enabling a Court to hear appeals and conferring on parties the right of appeal. But with reference to my second reason for thinking the clause inoperative, it has been pointed out that the Court is there directed to exercise "appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations *now in force*"—and it is suggested that these latter words validly confer an appellate jurisdiction in such cases till the jurisdiction is expressly taken away. I attach no weight to the word "*now*" as it seems to me purely descriptive, having reference to the jurisdiction to be exercised at the moment when the new Letters Patent were published. I presume that if any Act allowing appeals to the High Court had been repealed on the 1st January 1866, this Court could not have heard such appeals if presented after the publication of

the Letters Patent although the case had been subject to appeal by a law in force on the 28th of December 1865, the date which the Letters Patent bear. My opinion, therefore, is that the power of this Court to hear appeals from the Civil Courts in the interior (inseparable from the rights of parties to prefer the appeals) is now regulated by Act VI. of 1871.

In my opinion however we may safely adopt, and for the sake of obviating hardship and injustice we ought to adopt, the construction which the High Court of Bombay has put on Section 6, Act I. of 1868 in *Ruttun Chand versus Himmant Rao*, (VI. Bombay, 168, Appeals from Civil Jurisdiction), and we ought also to hold that it will cover specific proceedings taken in execution of a decree which have been commenced before the code came into force; that is, before the appeal of Act VIII. of 1859 became operative. By making this use of the 6th Section of the General Clauses Act, and by taking the view which I have taken of the effect of Section 3, it seems to me that all difficulty is avoided. The provisions of the Code will then have no retrospective effect so as to injure any right of action or right of appeal existing at the time when the code came into effect—at the same time that the procedure as intended by the Legislature will come into force with all its incidents in every case at the time indicated, that is to say, (1) the procedure in suits instituted after the code came into force will be wholly subject to its provisions; (2) the procedure in suits commenced before it came into force and pending at that time will be regulated by the previous law up to decree and by the code after decree—and (3) the procedure after decree in suits determined before the code came into force would thereafter be governed entirely by the code as to new proceedings, but not as to proceedings already commenced, which, according to the view now suggested, are specially protected by Act I. of 1868. With these indications of my own reasons, I concur in the proposed decision in the several appeals before us.

MARKBY, J. (Mitter, J. concurring).—This [No. 323 of 1877] was an application under Section 208 of Act VIII. of 1859 by the purchaser of a decree to be allowed to execute the decree. The application was rejected by the District Judge on the 17th August 1877.

The appeal to this Court was presented on the 12th of November 1877, that is after the new code came into force.

No appeal will lie against this order under Section 588, which only.

applies to orders made under the new code which this order certainly was not.

If, therefore, the appeal lies under the new code at all, it must lie as an appeal from an original decree under Section 540, which applies to decrees made under the old code as well as to decrees made under the new.

The question, therefore, is whether the order of the Lower Court was a "decree" within the meaning of Section 540.

By Section 2, "a decree means the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied."

By "the result of the decision of the suit," we understand to be meant the order of the Court granting or refusing that or some part of that which the suit was brought to obtain.

By "other judicial proceeding," we understand to be meant not the result of a judicial proceeding of any other kind whatsoever, but of a judicial proceeding which does not arise out of a suit such, for example, as proceedings other than suits to which by Section 647 the Procedure Code is made, as far as it can be, applicable.

No doubt the words "any other judicial proceeding" are capable of receiving a wider construction. Almost every order of a Court of Justice embodies the result of a judicial proceeding; and an order made on appeal always does so. Moreover in ordinary language an order made on appeal is called a decree.

But in the definition itself, we have an indication that this was not the intention in the fact that "an order on appeal, remanding a suit for retrial" is declared to be not within the definition. This we take to be an example or illustration, not an exception. If the wider construction of the words "any other judicial proceeding" were intended by the Legislature, a remand would have come within the definition. Because it cannot be denied that an order of that nature, though it does not embody the result of the decision of the *suit*, clearly embodies the result of the decision of the *appeal*. It declares that the result of the appeal is that the suit must be remanded for retrial.

Again, it is evident from a comparison of Chapters 41 and 42 with Chapter 43, that the Legislature intended in the last-mentioned chapter to provide for appeals against "orders" which are not "decrees." But many of these "orders" would be "decrees" if we were to adopt the wider construction of the words "any other judicial proceedings" as

mentioned above. Because under this wider construction, an execution proceeding, or a proceeding taken under Section 258 to compel a decree-holder to certify, or under Sections 311 and 312 to set aside a sale, or in an insolvency matter under Sections 351, 352, 353, or 357, or proceedings under Chapters 34 and 35 would be included within the words "any other judicial proceeding;" and orders referred to in Clauses (j), (k), (m), (n), and (r) of Section 588 would be "decrees" within the definition of that word as given in Section 2 of the Act. But a comparison of the chapters mentioned above clearly shew that that was not the intention of the Legislature.

Furthermore, if we were to adopt the wider construction of the words "other judicial proceeding" in Section 2, we should have to give the same construction to the words "proceedings other than suits and appeals" in Section 647 of the code. In this view of Section 647, the provisions of Sections 649 and 650 would be wholly unnecessary, for the matter dealt with by the last two sections would have then been already provided for by Section 647.

These are some of the considerations which lead us to adopt the construction of the words "any other judicial proceeding" which we have adopted.

The appeal in this case, therefore, does not lie either under Section 540, or Section 588 of Act X. of 1877, and there is no provision in any other Act, of which we are aware, under which it can be brought. There is no provision of Act VIII. of 1859, or of Act XXIII. of 1861 applicable to such a case. Section 11 of Act XXIII. of 1861 comes nearest to it, but it has been frequently held that this section does not apply to a proceeding under Section 208 of Act VIII. of 1859. Nor can the appeal lie under Section 16 of the Letters Patent of 1865. That section only empowers this Court to hear appeals in such cases as were subject to appeal to the High Court by virtue of any laws or regulations then in force. But this only throws us back again upon the old law which, as we have said, does not provide for an appeal in such cases as this.

In our opinion, therefore, no appeal lies in this case.

This [No. 360 of 1877] was an application to execute a decree for possession of land and costs. The Subordinate Judge, on the 17th March 1877, held that the execution was barred by limitation and rejected the application. The District Judge, on the 23rd August 1877, held that the execution was not barred, and ordered execution to issue.



On the 19th November 1877, the judgment-debtor presented an appeal to this Court.

For reasons already stated, no appeal can lie against the order of the Lower Appellate Court either under Section 588 of the new code, or under Section 584.

There was, however, a right of appeal to this Court against the order of the Lower Appellate Court at the time when that order was made under Act XXIII. of 1861, Section 11 which had not then been repealed, and though this Act was repealed when this appeal was presented, and though there is no provision in the new code under which an appeal can lie in this case, there is still nothing in the new code which expressly prohibits such an appeal. The prohibitory words in the first and last clauses of Section 588 do not apply to the order of the Lower Appellate Court in this case, inasmuch as that order was made before the new code came into force: and those prohibitions are not retrospective.

If the appeal in this case is taken away at all, it is taken away by the repeal of Act XXIII. of 1861, which formerly gave an appeal in this case. But we think that, notwithstanding the repeal of Act XXIII. of 1861, this Court is empowered to hear, and ought to hear, this appeal under the provisions of Section 16 of the Letters Patent of 1865.

That section provides that this Court "shall be a Court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to the appeal to the said High Court by virtue of any laws or regulations now in force."

We think this clause is in itself a sufficient authority to this Court to hear this appeal. It is not probable that the Legislature intended to take away a right of appeal which existed, though it had not been exercised, when Act X. of 1877 was passed. Had they intended this they would, we think, have used express words for the purpose.

No doubt the Supreme Legislature has power under Section 9 of the 24 and 25 Viet. P. 104, to take away from this Court the powers conferred by Section 16 of the Letters Patent; and by Section 588 of the new code it has taken away a large portion of those powers, but in our opinion, not in this instance.

It is said that Section 16 of the Letters Patent only gives the power to hear appeals, whereas Act XXIII. of 1861, which gives the right of appeal is repealed, and that, therefore, the appeal no longer lies.

With great deference it seems to us that so long as the power to hear the appeal remains, that is sufficient, and that the power of a Court to hear an appeal carries with it, as a necessary consequence, the right to an appellant to present to that Court a petition of appeal.

If, as very often happens, the power to hear the appeal and the right of appeal is given by one and the same provision, then the repeal of that provision would destroy the appeal altogether; but here there are two wholly independent provisions, one of which is untouched, and which is alone sufficient to enable us to hear this appeal.

We think, therefore, that this appeal should be heard.

This [No. 2 of 1878] is an application to execute a decree by which it was ordered that the judgment-debtor should execute a lease. The judgment-debtor objected that she ought not to be made to execute the lease and that execution of the decree was barred by limitation. The Subordinate Judge, on the 15th September 1877, overruled these objections and ordered the lease to be executed.

An appeal to this Court was presented on the 2nd January 1878.

For reasons already stated in Miscellaneous Regular Appeal No. 323 of 1877, no appeal lies to this Court against that order under Act X. of 1877. But as the law stood when the order of the Lower Appellate Court was made, an appeal against it lay to this Court under Act XXIII. of 1861, Section 11. In our opinion this Court is still empowered to hear this appeal under Clause 16 of the Letters Patent of 1865. We have given our reasons for this conclusion in the case No. 360 of 1877. That reasoning is applicable to this case: and we think this appeal ought to be heard.

In this case [No. 26 of 1878] the decree-holder has obtained a decree for rent: the decree-holder desired to attach the moveable property of the judgment-debtor. The judgment-debtor insisted that the decree-holder was bound to take that course, and on 17th March 1877 refused to execute the decree against the moveable property of the judgment-debtor. The decree-holder, on the 6th of April 1877, appealed to the District Judge, who, on 5th October 1877, set aside the Munsiff's order and ordered execution against the moveable property to issue. On the 4th January 1878, the judgment-debtor presented a petition of appeal to this Court.

For reasons already stated in Miscellaneous Regular Appeal No. 323 of 1877, no appeal can lie to this Court in this case under Act X. of 1877.

It, however, remains to consider whether, although no appeal lies against the order of the Lower Appellate Court under the new code the right of appeal, which undoubtedly existed before the new code came into operation, has been thereby taken away.

The appeal was given by Act XXIII. of 1861, Section 11, and there are only two modes by which the appeal so given can have been taken away,—(1) by the repeal of that Act; (2) by the prohibitory words of the first and last clauses of Section 588.

Act XXIII. of 1861 is repealed by the new code, Section 3, with the proviso that “ nothing herein contained shall affect the procedure prior to decree in any suit instituted or appeal presented before this code comes into force.”

Act I. of 1868, Section 6, also provides “ the repeal of any Statute, Act or Regulation, shall not affect anything done or any offence committed, or any fine or penalty incurred, or any proceedings commenced before the Repealing Act shall have come into operation.”

The repeal, therefore, of Act XXIII. of 1861 is subject to those two *provisos*.

The proceeding before the Lower Appellate Court, that is, the appeal of the decree-holder from the decision of the Munsiff, was commenced by the petition of appeal dated the 6th April 1877. It was therefore commenced before the Repealing Act came into operation. It appears to us, therefore, that in consequence of the second of the above *provisos*, the repeal of Act XXIII. of 1861 does not “ affect” that proceeding.

This being so, there was, at any rate, so far no difficulty in the way of the Lower Appellate Court making its order of October 5th under the old code; for though that code was then repealed, yet for the purposes of the appeal then pending for decision before the Lower Appellate Court, the old code still remained in force.

The question, however, still remains whether the order of the Lower Appellate Court ought to be considered as, in fact, made under Act XXIII. of 1861, or under the new code. This must be determined in order to see whether or not the case falls within the prohibitions contained in the first and last clauses of Section 588.

On the whole there is we think nothing in Act X. of 1877, which compels us to say that the order of the Lower Appellate Court was made under the new code: and as, for the purposes of the appeal in the Lower Appellate Court, Act XXIII. of 1861 was in force, we think that

the order of the Lower Appellate Court ought to be considered as, in fact, made under that Act, and not under the new code.

The prohibitory words therefore of Section 588 do not apply to this case.

If these prohibitory words do not apply, then, as already shewn in Miscellaneous Special Appeal No. 360 of 1877, this Court is empowered to hear this appeal under Section 16 of the Letters Patent of 1865, and we think, therefore, that this appeal ought to be heard.

The remaining four cases all stand upon the same grounds, as will appear from the following statement of facts :—

In this case [No. 27 of 1878] certain persons presented a petition to a Munsiff under Section 119 of Act VIII. of 1859, alleging that there had been an *ex-parte* decree against them, and praying that this decree should be set aside and the suit heard. The Munsiff on the 19th June 1877 rejected the application.

The petitioners appealed, and the Officiating District Judge, on the 27th September 1877, rejected the appeal.

The petitioners then on the 31st January 1878 presented a second appeal to this Court.

An appeal against the order of the Lower Appellate Court lay to this Court under Sections 119 and 372 of the former Code of Procedure.

In this case [No. 30 of 1878] a decree-holder applied for execution of a decree obtained *ex-parte*. The judgment-debtor then put in an application under Section 119, praying that the judgment should be set aside and the case heard. On this he was summoned by the Subordinate Judge to appear personally. He did not attend, and having given no evidence in support of his application, it was dismissed on the 15th March 1876. The judgment-debtor on the 26th April 1876 appealed, and on the 3rd October 1877, the Officiating District Judge dismissed the appeal.

On the 31st January 1878, the judgment-debtor presented a second appeal to this Court.

This appeal would lie under the provisions of Sections 119 and 372 of Act VIII. of 1859.

The decree-holder in this case [No. 33 of 1878] had obtained a decree for possession, mesne profits and costs. He applied for execution, and the Subordinate Judge, on the 5th August 1876, ordered that he should recover mesne profits from Srabun 1269 to the end of 1280, and certain costs which were specified.

The judgment-debtor, on the 10th August 1877, appealed to the District Judge, complaining against the order of the Subordinate Judge both as to mesne profits and costs. The District Judge, on the 30th November 1877, dismissed the appeal.

On the 31st January 1878, the judgment-debtors appealed to this Court

This appeal would lie under the provisions of Section 11 of Act XXIII. of 1861.

In this case [No. 48 of 1878] the decree-holder had obtained a rent-decree for money on the 16th September 1871. On the 18th July 1876 he applied for execution. The Subordinate Judge, on the 14th December 1876, held that execution was barred by Section 58 of Act VIII. of 1869 B. C. On the 13th January 1877, the execution-creditor appealed to the District Judge, who on the 15th December 1877, reversed the order of the Subordinate Judge and ordered execution to issue.

The judgment-debtor on the 25th February 1878 presented a petition of appeal to this Court.

This appeal would lie under Section 11 of Act XXIII. of 1861.

The question in all these last four cases is precisely the same, namely, whether the provisions under which these appeals were formerly given being repealed, the appeals will lie now, the repeal of those provisions notwithstanding?

For the reasons stated in Miscellaneous Special Appeal No. 360 of 1877 and Miscellaneous Special Appeal No. 26 of 1878, we think this Court is still empowered to hear these appeals, and that therefore these appeals ought to be heard.

In dealing with these appeals we have not given to Section 6 of Act I. of 1868 so wide an application as the Chief Justice and one other of the learned Judges are disposed to do. It seems to us that difficulties may arise if we give that Section too wide an operation. We prefer, therefore, to admit these appeals on another ground upon which they seem to us admissible, reserving, for the present, the consideration of the exact limits of application of Section 6 of Act I. of 1868 to the new Code of Procedure.

**AINSLIE, J.**—I concur with my learned brothers Markby and Mitter in thinking that in all cases in which an appeal lay under Act VIII. of 1859, the right of appeal is saved by the 16th Section of the Letters Patent.

This disposes of all the appeals before us excepting No. 323. The

order in this case was made under Section 208, Act VIII, 1859, and was not open to appeal. The matter dealt with by the order is now governed by Section 232 of the present code. Reading Section 588 clause (j) with clause (p) an order made under Section 232, if in favor of the assignee of a decree, is appealable as an order; but Section 588 only applies to orders made under the code, and Section 591 bars any appeal from an order not provided for by Section 588.

I therefore concur in rejecting appeal No. 323, and in admitting all the others before us.

### NO WRONG WITHOUT A REMEDY. \*

*(Ubi jus ibi remedium.)*

It is a maxim of law, that no wrong can be perpetrated without a remedy, in redress of it, against the wrong doer. That is to say, that wherever and whensoever, there occurs an actionable wrong, by whomsoever it has been committed, redress is available to the injured party. Mere novelty of the wrong will be no bar to such an action, in redress of it; as the world runs on, new things are created, new rights are originated in them, and new wrongs follow in their invasion. The principle of redress is this; it exists, as of its own nature, because there is a wrong. Where the principle is new, then the intervention of the legislature becomes necessary, to provide by statute, for the future (Broome's Legal Maxims, P. 148.) The right asserted and to be vindicated, must be in the largest sense, a legal right, and not void for impolicy or immorality. This being so, it must be preferred in a legal manner. It may be barred by laches, by the various statutes of Limitation, or other Acts. It must also be a superior right to that set up in plea to it, (vide page 11, Smith's Manual) and it may be defeated by Estoppel. Again, of wrongs committed by public officers, actions will lie against them. If for neglect to perform the duty, then they will be compelled to perform it. It suffices to add, that there can scarcely be such a thing as a legal right, without a corresponding remedy, for its invasion. The exceptions to this rule are those cases in which the individual injury merges into the public benefit or advantage. Thus, private property is invaded and appropriated for public purposes, such as the making

of roads, excavation of canals, construction of railways, improvements of towns, abatement of nuisances, and in every instance, with the remarkable exception of the latter, which it is fervently hoped, will not long continue an exception, compensation is given. That is to say, there is an indemnity for the loss. But still to a party not wishing to part with its property, who can deny the compulsory invasion of his right, to the prejudice of the enjoyment of it, in his own way? To these instances we apply the maxim *SALUS POPULI SUPREMA LEX* and *PRIVATUM INCOMMODUM PUBLICO BONO PENSATUR* i. e. the interests of individuals give way to the public advantage. Under these principles, we pull down a house in order to arrest the progress of a fire. That will be virtually a *DAMNUM ABSQUE INJURIA*; better that one house could be pulled down, than that the whole street should be destroyed. In India, we have constantly the institution of new markets and haunts, the vicinage of which certainly injures those already established; but the establishment of markets is an advantage to the public, and although no one can doubt that much injury is done without any corresponding public advantage, in the omission of the legislature to provide for the days upon which they are to be held, still the institution of new markets, are of those damages, which are not actionable wrongs. It is for the legislature to enforce the principle *SIC UTERE TUO UT ALIENUM NON LÆDES*, by preventing haunts being held within a few yards of each other, upon the same day, and thereby promote the peace of the country and the welfare of its inhabitants and put a stop to those scenes of violence, that prevail, in consequence of an exuberant system of Civil liberty. Less objectionably or rather wholly without objection, may be mentioned, the establishment of schools, shops, and so forth. Of torts generally, a tort is defined to be, "a wrong independant of contract," and involves the idea, if not of an infraction of Law, at least of some infringement of, or withholding of a legal right. A right of action is founded, 1st, on the invasion of some legal right; 2ndly, on the violation of some duty towards the public, productive of individual damage to the plaintiff or prosecutor; 3rdly, the infraction of some private duty or obligation productive likewise of damage to the complainant. With reference to the first, it is not necessary, that actual or specific damage should be proved to have resulted. With reference to the second, or *ex delictu* actions, the duty, its breach, and consequent damage must be proved, vide *passim* Broome's Commentaries Common Law, P. 658-659, Ch. 1, book 3.

## CALCUTTA HIGH COURT.

*The 15th July, 1878.*

FULL BENCH.

Before the Hon'ble Sir R. Garth, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson, C. I. E., W. Markby, W. Ainslie, and W. F. McDonell, *Judges*.

THE EMPRESS

*versus*

ASHUTOSH CHUCKERBUTTY, BANASWAR LUSHKUR, and AKBAR THANDAR.

*Section 30 of Act I. of 1872—Confession.*

Under Section 30 of the Evidence Act, the confession of a prisoner, which affects himself and some other prisoner tried jointly with him, is evidence against either prisoner, although when unsupported by other testimony, it is evidence of the weakest possible kind against the latter, and a conviction come to upon it alone is illegal.

The word 'Court' in Section 30 means the Court before which the trial of the prisoner is to be had, and in a Jury trial it means the Judge and Jury both.

Reference to the Full Bench, by a Bench composed of Mr. Justice McDonell and Mr. Justice Broughton.

REFERENCE.—The three prisoners have been convicted by the Additional Sessions Judge of 24-Pergunnahs of murder, and have been sentenced to death, and the proceedings have been sent up to this Court for confirmation of the sentence under Section 287 of the Criminal Procedure Code. The prisoners have likewise appealed.

With reference to the prisoners Baneswar and Akbar, it was argued before us that the evidence, on the record, was not legally sufficient to convict them of the offence charged; that the so-called confession and statement of Ashutosh was not legally admissible as evidence against the other two; that the Judge had erred in law, and had misdirected the Jury, when he put before them Ashutosh's confession, and told them they might take it into consideration as against the other two prisoners. Various rulings on Section 30 of Act I. of 1872 have been pointed out to us. In these decisions\* it has been held

	Page.	
* 11 Bombay High Court Reports	196	that such confessions are of little weight,
19 Weekly Reporter	16	unless they are corroborated by other testimony;
19	57	that they have all the infirmity that
19	67	attaches to the evidence of an accomplice;
21	69	in fact, that they are of less weight as they
23	42	are not given on oath, and the party making
24	43	them is not subject to cross-examination:
25	8	it has further been held that they cannot
25	43	be used as the basis of a case, but
The Queen vs. Narain Seti and others, decided by Markby and Morris, J. J., on 27th May 1875.		merely as corroborative of other independent evidence.



In some of the decisions\* it has been pointed out that the Legisla-

	Page.	
* 24 Weekly Reporter	42	ture have avoided calling the statement
23 " "	42	" evidence," and finally it has been held†
24 " "	42	in the case of Narain Teli and others, that the statement (in a case

† 27th May 1875, decided by Markby and Morris, J. J.

the jury; that the word "Court," in Section 30 means only the Judge and not the jury; and that not being "evidence," as defined in Section 3 of the Evidence Act, the jury ought not to be allowed to take into consideration the confession of one prisoner as against his fellow-prisoners.

With the last decision, as at present advised, we do not agree. We think that, if a confession is to be used at all, it must be used by the tribunal which is to deal with the case; that is to say, by the Judge and jury when the trial is by Judge and jury, and by Judge and assessors where that mode of trial is adopted; and that the word "Court" must therefore mean the tribunal, whatever that tribunal may be. Again, if it is to be used at all, it cannot, we think, be used as anything else but as evidence. We agree, however, in thinking with the learned Judges, who have decided the other cases, that it is material of the very lowest order and of far less force than the evidence of an accomplice, which itself ought to be accepted only under most exceptional circumstances without corroboration, inasmuch as the confession is made without oath or affirmation, and the person making it is not subject to cross-examination.

It appears to us that there is some conflict of opinion as to whether such confession, when used against others only stand in need of corroboration, or whether, as ruled in the 24 Weekly Reporter (with which decision we concur, differing, as it seems to us that it does, from the course taken in others of the cases we have referred to) that such confession cannot be used as the basis of a case, but merely as corroborative of other independent evidence.

The questions we would wish the Full Bench to consider are—

1. Whether a confession made by one person, who is being tried jointly with others for the same offence, and affecting himself and some other such person (and which is proved) is to be treated as "evidence" against such other person under Section 30 of Act I. of 1872, or whether the words "the Court may take into consideration such confession, &c.," to the end of the section mean that such confession is to be

treated, not as "evidence" but in some other manner, and, if so, in what manner should such confession be treated?

2. Whether the word "Court," as used in that section, means the Judge only in a trial by a Judge with a jury, or includes both Judge and jury?

3. Whether a confession made by one such person may be used as the basis of proof of the offence charged as against the other, and, if corroborated, may sustain a conviction; or whether it is necessary in order to sustain a conviction, to use such confession only as is itself corroborative of other independent *evidence*?

The Judgment of the Full Bench was as follows :—

GARTH, C. J.—I am of opinion that under Section 30, the confession of a prisoner, which affects himself and some other prisoner, charged with the same offence becomes, when duly proved admissible in evidence as against both prisoners, and must be so dealt with by the Court.

When this confession has been *duly proved*, it may, by the express language of the section, be taken into consideration against either prisoner; and I do not see in what other way it can be taken into consideration than *as evidence*. There is no provision in the section, by which the confession is to be receivable against one prisoner in one way and against the other prisoner in another way.

But, although the section does, in my opinion, notice the confession admissible in evidence against either prisoner, the weight which ought to be attached to such evidence, and the question whether taken by itself, it is sufficient in point of law to justify a conviction, is a question for the Judge who tries the case.

A confession by prisoner A., which involves the guilt of prisoner B., is, of itself, unsupported by other testimony, evidence of the weakest possible kind against B. It is simply the statement of a third person, not made upon oath or affirmation, and I am of opinion that no Court ought to convict prisoner B. upon such evidence.

I consider, moreover, that, if a prisoner were convicted upon such evidence whether by a Jury or otherwise, and were to appeal to this Court the conviction ought to be set aside; and further, that any Sessions Judge, trying such a case before a jury, ought to direct them to acquit the prisoner. How far any corroborative evidence would be sufficient, coupled with the confession, to convict a prisoner, must depend upon the circumstances of each particular case.

2. I consider that the word "Court" must mean the Court before which the trial of the prisoner is to be had, and in a jury trial must

mean *the Judge and Jury*. I cannot think that word "Court" is intended to mean "the Judge and Jury," as regards one portion of the confession, and the Judge only, exclusive of the jury, as regards the other portion.

If the confession is corroborated by other evidence, I do not think it matters whether in proving the case at the trial the confession precedes the other evidence, or the other evidence precedes the confession.

The course of proof in each case is a question of convenience for the prosecution, and they have a right to bring forward the evidence in any order they may think fit.

JACKSON, J.—In my opinion, the confession spoken of in Section 30 of the Evidence Act to put the intention of the Legislature into a common English phrase "is evidence." I also think it evidence for jury at a sessions trial in India, but I think at the same time it is not singly sufficient to support a conviction, that is to say, an accused other than he who has confessed cannot lawfully be convicted upon such confession alone, nor in my opinion ought to be convicted on the ground of such confession corroborated by circumstantial evidence, unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction.

In considering such questions as these it appears to me that embarrassment and difficulty will be greatly lessened if, instead of assuming the English law of evidence and then enquiring what changes the Evidence Act has made in it, we regard, as I think we are bound to do, the Act itself as containing the scheme of the law, the principles, and the application of these principles to the cases of most frequent occurrence.

It may be that, as observed by Mr. Norton in his preface (*Law of Evidence*, 8th Edn.) the framer of the Act over-estimated what had been done when he claimed to have reproduced within the compass of his 167 Sections the whole of the Taylor's work that was applicable to India, and there can be no doubt that cases must arise, for which no positive solution can be found in the Act itself, and in such cases we shall probably be justified, and shall always be safe, in adopting English rules in so far as they follow, or are in accord with the general lines of the Act. But in respect of matters expressly provided for in the Act, we must, so to say, start from the Act, and not deal with it as a mere modification of the law of evidence prevailing in England.

The Legislature in my opinion has not *avoided* calling the confession of a accused person "evidence" against a co-prisoner. It has

not so called it because that is not the phraseology of the Act; what its framers appear to have had chiefly in view, and what they have expressed in the way which they considered most suitable, was—1st, what facts are relevant and what irrelevant for the purpose of producing a firm belief; and 2nd, in what manner such facts as are relevant are to be proved.

The following is the definition or explanation of the expression “proved”:—A fact is said to be proved when, after considering the circumstances before it, the Court either believes it to exist, &c.

It seems to follow therefore that if a relevant fact is proved, and the law expressly authorises its being taken into consideration, that is, considered for a certain purpose, or against persons in a certain situation, the fact in question is “evidence” for that purpose, or against such persons although the result has not been expressed in those words by the Legislature, and being “evidence,” it must be used in the same way as everything else that is “evidence.”

What the Legislature intended to denote whenever the word “evidence” is used in Act, is carefully explained in the interpretation clause.

A confession is an admission, and by Section 21, admissions are relevant; ordinarily such admissions can only be proved against the person making them, and therefore if the prosecution of a trial before the Court of Sessions proved a confession made by a person than under trial, the Court would be obliged to hold that it was relevant, and could be considered only against the person making it, but the 30th Section expressly says that such confession *when proved* may be considered as against other persons being jointly tried for the same offence who are affected by it; the first point therefore seems made out by the terms of the Act itself.

In truth, it seems impossible to avoid in such cases producing an effect upon the mind when a confession is read, extending to every person named in the confession. Even the Judge with the best balanced mind conceivable, if he spoke with absolute sincerity and self-examination, would probably admit that his mind was in some degree affected by the confession of one man criminating another, provided that he believed the confessing prisoner to be in the main veracious.

It may be, therefore, that the Legislature did wisely in recognising and taking under its control the impression thus unavoidable, which might actually do more harm if unrecognized.

The confession being thus what is called "evidence," it seems to me clearly matter for the jury to consider.

So far as I can call to mind the only mention of a jury in the Evidence Act occurs in Section 166, which prescribes how questions may be put by jurors.

But certainly neither in that Act nor in the Code of Criminal Procedure is there, so far as I am aware, any trace of an intention to separate evidence which may be considered by a jury from that which may be considered by a Court.

Nor in my opinion does the definition of the word "Court" in the Evidence Act exclude the jury; it runs thus—"Court" includes all Judges and Magistrates and all persons, except arbitrators, legally authorized to take evidence but it does not therefore necessarily *exclude* a jury, for when the definition is intended to be exclusive, it would seem the form of words (as in the next following definition) is *means and includes*.

Besides it appears to me that for the purposes of the definition, the jury are authorized with the Judge to take evidence. They certainly hear it, and decide upon its value.

As to the language of Section 255 the word evidence there is not, I think, used with reference to its definition in the Evidence Act, and even if it were I do not consider that it would create any difficulty.

It seems to me impossible to consider that the Legislature should have intended that confessions admitted to consideration under such circumstances should be used in any other way than by making them (to use the English term again) "evidence,"—or that having made them "evidence," and having contemporaneously provided for the trial of a large class of offences by a jury invested with the power of determining questions of fact, they should have silently withdrawn such "evidence" from the consideration of the jury, permitting it to be considered by the Court, which has not the functions of deciding on the facts.

There remains the question of the effect to be given to such confessions, and this point also appears to me not doubtful.

The confession clearly cannot stand higher as to probative force than the testimony of an accomplice, who is declared to be a competent witness against an accused person (Section 133), and the law does not say of the confession as it says of such testimony that a conviction is not illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice. That being so, I consider that we are

free to lay down the rule which would undoubtedly prevail in England if it were possible that such matter could be admitted, and to hold that a conviction based upon such confession alone would be illegal—and not only so, but that such confession will not legally suffice when corroborated by other facts of which evidence is offered, unless those facts are such that if believed to exist, they would of themselves suffice to support a conviction.

I need hardly advert to the fact that the Legislature which, declaring that a conviction is not illegal, because it depends on the uncorroborated testimony of an accomplice, at the same time enumerates examples of facts, which the Court may presume mentioning prominently this one that an accomplice is unworthy of credit, unless he is corroborated in material particulars, and the facts afterwards instanced as fit to be considered for the purpose of limiting the application of this maxim, have reference, I conceive, only to the case of the accomplice witnesses as the illustration (b) itself has also.

I would answer the questions put, as above stated.

MARKBY, J.—Upon a question of the construction of an Act of the Legislature, it is very desirable that there should be no dissentient opinion. My learned brethren having come to the conclusion that a conviction by a jury, upon the uncorroborated confession of an accomplice would, except as against the accused person who makes the statement, be illegal. I am content to abandon my own doubts, and to concur in their decision that the confession of an accomplice is, by the law of India, evidence against his fellow-prisoner.

AINSLIE, J.—Courts of justice in dealing with questions of fact have to determine whether the alleged facts are proved, disproved, or not proved. They can only do this by considering the matters before them, bearing upon the existence or non-existence of the alleged facts, and whatever goes to show the existence or non-existence of a fact is evidence in respect of that fact.

The Indian Evidence Act in the 30th Section speaks of certain confessions by a prisoner as proper to be taken into consideration, not only as against the person by whom they are made, but also as against any other person who is being tried jointly for the same offence. Such confessions may legally go to make up the proof of the offence as against the latter, and if so, it is impossible to describe them as anything but evidence. In the case of a confession proved by oral testimony or previously reduced to writing by a Magistrate, and proved by the pro-

duction of the record, the definition of "evidence" in Section 3 of the Evidence Act will clearly include such proof. There can be no reason for holding that a confession made during a trial in the Court of Sessions in open Court is to be treated as something different; therefore, I hold that all confessions which can legally be used under Section 30 are evidence.

In the case of trial by jury, it is specially the province of the jury to determine whether the evidence before it adduced to prove the charges laid against the accused is trustworthy. It is the duty of the Judge to exclude irrelevant evidence, but as regards the evidence, which is decided to be relevant, it is the duty of the jury to determine its credibility and generally its sufficiency.

If a case is left to go to a jury at all, the whole of the admissible evidence must go to the jury, and therefore the word Court in Section 30 must include the jurors, who are to determine on the evidence.

But under Section 251, Criminal Procedure Code, a Sessions Judge is empowered to stop a case, without referring the evidence to the jury, when he thinks there are no grounds for proceeding, and directing the jury to return a verdict of acquittal.

To a certain extent, therefore, the Judge is to determine the sufficiency of the evidence, and he is empowered to direct a jury to return a verdict of acquittal, when there is no evidence to go to it, except the uncorroborated statement of a confessing fellow-prisoner under trial at the same time.

I think that he is not only empowered but bound to exercise this power. The case does not come within the words of Section 133 taken strictly, and that section itself must be taken into illustration (b) Section 114, which shows that it is reasonable to presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. Material particulars, as has frequently been pointed out, are those which go to connect the accused with the offence, and not merely those which go to corroborate the general story of the crime. There is not, in my opinion, anything in the law inconsistent with the view, that a Sessions Judge is bound to stop a trial when there is nothing against an accused person, but an uncorroborated statement of a fellow-prisoner, being jointly tried for the same offence, and that a failure to do this amounts to an error in law which will vitiate a conviction by a jury, arrived at under such circumstances.

**MCDONELL, J.**—On the first and second point I agree with my learned brethren. I took the same view when referring the case to the Full Bench. On the third point I entirely concur in the judgment of Mr. Justice Jackson.

## THE LAW OF MORTGAGE IN INDIA.

## SIMPLE MORTGAGES.\*

*(In continuation of p. 100.)*

I will now call your attention to section 271 of the Civil Procedure Code—a section which I may venture to say is by no means a favorable specimen of legislative workmanship. The section says as follows:—  
 “If, after the claim of the person on whose application the property was attached has been satisfied in full from the proceeds of sale, any surplus remain, such surplus shall be distributed rateably amongst any other persons who, prior to the order for such distribution, may have taken out execution for decrees against the same defendant, and not obtained satisfaction thereof. Provided that, when any property is sold subject to a mortgage, the mortgagee shall not be entitled to share in any surplus arising from such sale.”

Now the first observation which I think it necessary to make upon this section is that its language clearly points to a case in which there is a surplus, and there are rival judgment-creditors among whom it has to be distributed. It has no application where the mortgagee is the only creditor who seeks to be paid out of the surplus proceeds as being money payable to his debtor in the hands of the Court. In other words, the judgment-debtor cannot object to the mortgagee's demand to be paid out of the surplus purchase money. (24 W. R., 305.) The only ground upon which he could do that would be that the mortgagee was bound to satisfy his debt, as far as he could, in the first instance, by the sale of the property pledged to him. But as we have already seen, the mortgagee is not under any such liability, and the result of the recent authorities is that a mortgage creditor is not in a less favorable situation than an unsecured creditor in respect of the proceedings allowed by the law for the purpose of enforcing a judgment for money.

The next question which arises upon the section is whether in a contest between unsecured creditors and a mortgagee, where the money in the hands of the Court is not sufficient to pay all the creditors in full, the mortgagee can waive his rights as mortgagee, and insist upon sharing in the surplus as an ordinary creditor. You will see that the considerations which arise here are very different from those which would arise if the contest was solely between the debtor and the creditor. The law seems to be anxious to guard against a wanton sacrifice of the rights of the unsecured creditors, and upon a principle which has

\* *Vide Tagore Law Lectures—1875-76, Lecture IV., by R. B. Ghose, pp. 116 to 133.*



its foundation in equity and good conscience—a principle which I shall explain in a subsequent lecture—the mortgagee is not permitted to share in the purchase money which is paid, not for the absolute interest in the estate, but only for the equity of redemption. The mortgagee has in his mortgage ample security for the realization of his dues, and his rights are in no way prejudiced by refusing to permit him to share in the surplus proceeds, while very great injustice might be done if a different course were followed. Thus, for instance, suppose an estate is worth Rs. 50,000, and that it is mortgaged for Rs. 25,000. If the estate is sold subject to the mortgage, it will sell only for Rs. 25,000, being the value of the equity of redemption. The mortgagee is, therefore, sure to get his money out of the estate, but suppose he is permitted to share in the surplus proceeds, the result will be that the purchaser will be benefited, and the debtor and his creditors will suffer to the extent to which the lien is reduced. Thus, suppose the mortgagee gets Rs. 5,000 under an order for distribution. The fund available to the unsecured creditors will be less by that amount, while the purchaser under the execution will get property worth Rs. 50,000 for only Rs. 45,000. It seems to me, therefore, notwithstanding certain expressions in the judgment of the Court in *Fakeer Buksh v. Chutlerdharee* (14 W. R., 209), which might seem to support a contrary view, that a mortgagee is not entitled to share in the surplus arising out of the sale of property which is sold subject to his mortgage, *i. e.*, as I have already explained, when the contest is one between him and the unsecured creditors of the debtor. If there should be any surplus after satisfying the claims of the unsecured creditors, the mortgagee may have a right to such surplus.

I have said that the result of the recent authorities seems to place the mortgagee's right to proceed against any property belonging to his debtor beyond all doubt. It may, however, be doubted whether the doctrine does not require some qualification—a qualification which is based upon the same principle which excludes the mortgagee from the benefit of an order for distribution under section 271 of the Procedure Code. I think there can be no doubt that the mortgagee has ordinarily the right to proceed against any property belonging to the judgment-debtor, but should not this right be restricted when the equity of redemption has passed away from the judgment-debtor to a third person. Thus, to take the illustration given in the last paragraph, the purchaser pays only Rs. 25,000 for the property purchased by him, as it is sold subject to a mortgage for Rs. 25,000. Now if the mortgagee is per-

mitted to proceed against other properties, without in the first instance proceeding against the property pledged to him, the purchaser may acquire an estate worth Rs. 50,000 for one-half the sum. It is probable that the judgment-debtor may not be wholly without a remedy, and he will be perhaps entitled to the benefit of the lien, and the equities between the parties may possibly be worked out in a regular suit between the purchaser and the debtor. But I think this would be a perfect waste of litigation, and the limitation which I have ventured to suggest on the right of the mortgagee to proceed against his debtor ought to be accepted, if for no better reason, at least for the prevention of that circuity of action which the law is generally supposed to abhor. The legislature also would seem to have guarded against this very evil by refusing to permit the mortgagee to share in the surplus proceeds of property sold subject to his mortgage, for I conceive that even if there had been no such provision, the unsecured creditors would have been permitted to stand in the place of the mortgagee to the extent to which the fund to which they were exclusively entitled to look for the satisfaction of their dues, was reduced by the action of the mortgagee; and this upon a doctrine which is by no means peculiar to any particular system of jurisprudence, but which has its foundation in the broadest principles of equity and good conscience. It may be said that it would be beyond the province of the Court to impose limitations and restrictions on the rights of creditors which are not to be found in the Code of Civil Procedure, but the principle to which I refer is in no sense whatever a part of the law of procedure, and its introduction would not, I apprehend, be regarded as in any way trenching upon the province of the legislature. (*Mirza Fulleh Ali v. Gregory*, 6 W. R., Mis., 13; 4 Madras, 49.)

The question as to what is meant by "sold subject to a mortgage" has given rise to considerable discussion. In a recent case, *Pakeer Buksh v. Chutterdharee Chowdhry*, the Court observed: "We think that section 271, Act VIII. of 1859, or rather the proviso in that section, is intended to apply to a case where the property is actually sold subject to a mortgage, and where the transaction is such that the purchaser is buying the property subject to the mortgage, where he is, in fact, only buying the equity of redemption which remains in the judgment-debtor; and it does not apply to a case where there is merely the right by law in the mortgagee to enforce his mortgage against the purchaser. This appears to have been the view taken by this Court in a decision reported in 6 Weekly Reporter, Miscellaneous Rulings, page 13.

“There the Court says:—‘It is not equitable that the purchaser who purchased and paid for only the mortgagor’s interest in this property, should hold it released from Gregory’s lien.’ Now, here it does not appear that the sale to the purchaser was in fact subject to the mortgage. By ‘in fact’ we mean that it was not so subject by the contract of sale, and there was merely a legal right existing which might be capable of being enforced. It seems that a petition which was presented by the present appellant was not taken notice of, and neither in the proclamation of sale, nor in any of the sale proceedings, is mention made of the existence of any mortgage. Nor is there anything to show that only a limited right of the judgment-debtor was to be sold. Therefore, upon that construction of section 271, we should say that the proviso does not apply to the present case.” (14 W. R., 209-10.)

According to this decision the mortgagee may share in the surplus proceeds, although the purchaser—aware that the property was in law subject to a mortgage—paid only the price of the equity of redemption, and not that of an absolute interest in the property. If the contest had been between parties who had induced an honest purchaser to lay out money in the *bond fide* belief that he was purchasing the property free of all encumbrances, such a construction might be supported on the ground that it tended to prevent a circuity of action, for the consequence of refusing the mortgagee to share in the distribution would be to throw him upon the mortgaged property, with the further consequence that the purchaser would have a right to ask the unsecured creditors to refund a portion of the purchase money equal to the amount of the mortgage. But the doctrine of a purchase in good faith for valuable consideration without notice has not been ever applied to a purchaser under an execution, who purchases only the rights and interests of the debtor, while its extension to every case in which no mention is made of the mortgage at the time of the sale, would be wholly without precedent. It seems to me, therefore, with very great deference, that the proposition laid down by the Court in *Fakeer Buksh v. Chutterdharee Chowdhry* (14 W. R., 209), cannot be supported to its full extent, as the only foundation upon which it could be placed, the prevention of a multiplicity of suits, fails. I say the only foundation, because I think that it is quite clear from what I have said that the doctrine would be open to the same objection as permitting the mortgagee to share when the property is sold expressly subject to a mortgage.

I have already said that a sale by an unsecured creditor passes only the equity of redemption. There may, however, be cases in which the purchaser acquires a higher right. Thus, for instance, in the case of *Mudhusundun Sing v. Mukundloll Sahas* (23 W. R., 373),—where execution was taken out by one of the creditors against an estate which was subject to a mortgage in favor of another creditor, who also had placed an attachment on the property, and the property was subsequently sold at the instance of the first creditor, but without any mention of the mortgage—it was held by the Court that what passed to the purchaser under the sale was not the bare equity of redemption, but the property itself, free of the mortgage held by the other creditor; and the case of *Nadir Hussien v. Baboo Pearoo* (19 W. R., 255) lays down still more broadly that when an estate is sold pending an attachment by the mortgagee, the lien is transferred from the property to the purchase money, and the purchaser acquires the property discharged from the lien. The rule laid down in these cases is likely to prevent, in some measure, the evils which attend all sales in execution in this country; it being by no means an uncommon thing for the same property to be sold successively five or six times, first by an unsecured creditor, and then by the mortgage creditors of the debtor; the third mortgagee probably coming in first, then the second mortgagee, the first mortgagee closing the scene; and this although execution had been taken out and the property attached by all the creditors, when the sale took place at the instance of an unsecured creditor.

I shall now refer to another section of the Procedure Code which also has created no little difficulty. I allude to section 270 of the Code. That section says:—"Whenever property is sold in execution of a decree, the person on whose application such property was attached shall be entitled to be first paid out of the proceeds thereof, notwithstanding a subsequent attachment of the same property by another party in execution of a prior decree." Now this section in terms gives to the creditor by whom the property is first attached, *i. e.*, first made available to the creditors of the debtor, the right to be paid first. But suppose the property is sold by a mortgagee who comes in after the property has been attached, but whose mortgage is prior to the attachment. It cannot be said that his claims should be postponed to that of the unsecured creditor, and yet the language of the section would seem to leave no discretion to the Court of execution in the matter. It is unnecessary to discuss if this is the right view, for, as explained by the

Court in a recent case (22 W. R., 98), the enactment was never intended to alter or limit the rights which a person may have acquired by contract independently of the rules embodied in the Code of Civil Procedure. As the law, therefore, at present stands, the Court of execution is frequently obliged to make an order which the Court knows, and which the parties perhaps know equally well, will be set aside in what is called a regular suit. I speak with reserve, but it seems to me that the whole chapter on execution in the Civil Procedure Code relates to sales in *execution* of decrees for money, and not to sales under decrees for that purpose obtained by mortgagees. The provisions relating to attachments and the language of section 259 of the Code leave on my mind a very distinct impression that the legislature had before them only one class of sales, those in execution of decrees for money.

I will end with a few general observations on the security to which the mortgagee becomes entitled under an ordinary simple mortgage. Now it is necessary to bear in mind that a simple mortgage creates a real right, and that the defence of purchase for value without notice is not applicable to a suit by a mortgagee to enforce his security. I have already explained the origin of this doctrine introduced by the English Court of Chancery for the purpose, among others, of guarding against the consequences of treating a contract as a conveyance. It is, therefore, that, as a general rule, the defence is not allowed when the right sought to be enforced is a legal right, and not one which is recognised only by equity. It would be beyond the province of these lectures to explain the doctrine at length, and if I recur to it, it is only because its somewhat indiscriminate application in this country has attracted to it a cloud of prejudice, much of which, when kept within reasonable limits, the doctrine certainly does not deserve. The real truth seems to be that the doctrine is in some measure a 'survival,' and points to times when a conveyance was a transaction which never could take place secretly, while a mere agreement was not attended with any such publicity. In these days, when the title to real property passes by mere writing, a conveyance may be attended with as little publicity as an agreement to transfer at a future time, and it is this feeling apparently which has led to the extension of this doctrine to real rights. In all enlightened systems of jurisprudence, however, the somewhat cumbrous formalities which our forefathers insisted upon as a protection against fraudulent practices, are gradually giving way to a system of Registration of Assurances.

The question whether a security is available against a purchaser from the mortgagor without notice of it, was raised in the Calcutta High Court in the case of *Moharajah Moheshur Bux Singh Bahadoor v. Bhikha Chowdhry*, and was answered in the affirmative. Sir Barnes Peacock, in giving the judgment of the Full Bench, observed: "As to the *second* ground which has been raised for our opinion,—namely, that the purchaser under the bill of sale was a *bonâ fide* purchaser without notice, and therefore entitled to priority,—if the bond was really and *bonâ fide* executed before the date of the defendant's purchase, it would *primâ facie* be entitled to priority, and the defendant could not, according to the decision in the case of *Verden Seth Sam v. Luckpathy Royjee Lallah* (Marshall's Reports, p. 461), succeed without proof that he was a *bonâ fide* purchaser for value without notice. But even if the defendant were to satisfy the Court upon that point, he would not, in my opinion, be entitled to priority, unless the plaintiff was bound to give notice of his bond. If he was not bound to register it in order to retain priority over subsequent purchasers for value, I do not see what notice he could give, or was bound to give. The mere charge upon an estate does not give a right to the possession of title-deeds; and even if it would, the plaintiff in the present case had a charge, not upon the entire estate, but only on one or two villages, which would not give him a right to the possession of the title-deeds to the whole estate.

"But if the defendant should prove that he was a *bonâ fide* purchaser for value, he would throw the onus on the plaintiff of proving that he actually advanced the money as alleged in the bond creating the charge, and that the bond was executed before the defendant's purchase." (5 W. R., 63. See also 4 Madras, 434; 5 Madras, 457.)

Mr. Justice Campbell, who was of a different opinion, pointed to the "frightful consequences which may result if it be established as law that a lien on real property without either publication or possession will suffice to defeat the most cautious purchaser." "I should fear," adds the learned Judge, "that in this country the result would be an entire insecurity of title; that it would be impossible for any man by any amount of caution to buy real property with any confidence or any security that secret lien-holders may not start up with documents (or possibly even asserting verbal engagements) proved, as proof here goes, and which he cannot disprove, and may defeat or harass him." (5 W. R., 67.)

It is impossible to deny that there is a good deal of truth in these

observations. In countries where the Roman doctrine of hypothecation obtains, the evil is guarded against by the device of public hypothec books, and the same purpose is served by the new system of registration which has been introduced into this country since the passing of the 16th Act of 1864.

The fact that hypothecation confers a real right seems also to have been overlooked in some of the earlier cases on the Statute of Limitations, in which it was held that a mortgagee was bound to enforce his security within the time limited to suits for breaches of contracts. (*Seetul Singh v. Baboo Sooraj Bux*, 6 W. R., 318, since overruled. See *Sarwar Hossein v. Shazada Golam Mohamed*, 9 W. R., 170.) In the last case it was held that a suit to enforce a security is a suit to recover an interest in immoveable property within the meaning of clause 12 of the first section of Act XIV. of 1859. It must not, however, be understood that the same extended period was allowed to the mortgagee to sue on the covenant which must be enforced within the same period as any other contract. (10 W. R., 379; 10 W. R., 56.) The new Limitation Act has, by Art. 132, Schedule II., expressly provided for suits "for money charged upon immoveable property," and the period of limitation is stated to be twelve years from the time when the money becomes due. It would seem, although the language is not very precise, that, as under the old law, the remedy on the covenant must still be sought within the period limited for contracts.

It follows from what I have said as to the nature of the right created by a simple mortgage, that a suit to enforce the security must, like any other suit for land, be brought in the Court within whose jurisdiction the land is situated, although the remedy against the person may have to be sought in a different forum. There is indeed a case at 9 Bombay, page 12, in which a different view is taken, but I presume it cannot be supported. (See 18 W. R., 269; 18 W. R., 287.) As the law was understood before the Full Bench ruling in *Haran Chunder Ghose's* case (23 W. R., 187), it was of the utmost importance to the plaintiff to bring his suit in the proper Court, as no other Court than that within whose jurisdiction the land was situated, could make a decree expressly directing a sale of the mortgaged property; and this declaration was always sought by the mortgagee, although the mortgagor had not in any way parted with his interest in the property either by a sale or a second mortgage. It is true that, under a recent ruling of the Calcutta High Court, a mere money decree is, as between the parties, as good as a decree for sale, but the mortgagee would certainly act safely in expressly asking for the usual decree for sale, which, as I have already explained, can only be made by the Court within whose local limits the land is situated.

## PRINCIPLES OF THE INDIAN PENAL CODE.

[As explained by the original framers and laid before the Governor General of India in Council in the year 1837.]

### NOTE D.

(In continuation of page 267.)

#### ON THE CHAPTER OF OFFENCES RELATING TO THE ARMY AND NAVY.

A few words will explain the necessity of having some provisions of the nature of those which are contained in this Chapter.

It is obvious that a person who, not being himself subject to Military law, exhorts or assists those who are subject to Military law to commit gross breaches of discipline, is a proper subject of punishment. But the general law respecting the abetting of offences will not reach such a person; nor, framed as it is, would it be desirable that it should reach him. It would not reach him, because the Military delinquency which he has abetted is not punishable by this Code, and therefore is not, in our legal nomenclature, an offence. Nor is it desirable that the punishment of a person not Military who has abetted a breach of Military discipline should be fixed according to the principles on which we have proceeded in framing the law of abetment. We have provided that the punishment of the abettor of an offence shall be equal or proportional to the punishment of the person who commits that offence: and this seems to us a sound principle when applied only to the punishments provided by this Code. But the Military penal law is, and must necessarily be, far more severe than that under which the body of the people live. The severity of the Military penal law can be justified only by reasons drawn from the peculiar habits and duties of soldiers, and from the peculiar relation in which they stand to the Government. The extension of such severity to persons not members of the military profession appears to us altogether unwarrantable. If a person not Military who abets a breach of Military discipline should be made liable to a punishment regulated, according to our general rules, by the punishment to which such a breach of discipline renders a soldier liable, the whole symmetry of the penal law would be destroyed. He who should induce a soldier to disobey any order of a commanding officer would be liable to be punished more severely than a dacoit, a professional thug, an incendiary, a ravisher, or a kidnapper. We have attempted in this Chapter to provide, in a manner more consistent with the general character of the Code, for the punishment of persons who, not being Military, abet Military crimes.



## NOTE E.

ON THE CHAPTER OF THE ABUSE OF THE POWERS OF PUBLIC  
SERVANTS.

This Chapter is intended to reach offences which are committed by public servants, and which are of such a description that they can be committed by public servants alone.

We have found considerable difficulty in drawing the line between public servants and the great mass of the community. We hope that the description which we have given in Clause 14 will be found to comprehend all those whom it is desirable to bring under this part of the law, and we trust that, when the Code of procedure is completed, this description may be made both more accurate and more concise.

Those offences which are common between public servants and other members of the community, we leave to the general provisions of the Code. If a public servant embezzles public money, we leave him to the ordinary law of criminal breach of trust. If he falsely pretends to have disbursed money for the public, and by this deception induces the Government to allow it in his accounts, we leave him to the ordinary law of cheating. If he produces forged vouchers to back his statement, we leave him to the ordinary law of forgery. We see no reason for punishing these offences more severely when the Government suffers by them than when private people suffer. A Government, indeed, which does not consider the sufferings of private individuals as its own, is not only selfish, but short-sighted in its selfishness. The revenue is drawn from the wealth of individuals, and every act of dishonest spoliation which tends to render individuals insecure in the enjoyment of their wealth, is really an injury to the revenue. On every account, therefore, we think it desirable that the property of the State should, in general, be protected by exactly the same laws which are considered as sufficient for the protection of the property of the subject.

We are not without apprehension that we may be thought to have treated the transgressions of public servants too favorably, to have passed by without notice some malpractices which deserve punishment, and, where we have provided punishments, to have seldom made those punishments sufficiently severe.

It is true that we have altogether omitted to provide any punishment for some kinds of misconduct on the part of public servants. It is true also that the punishment which we propose in this Chapter are not generally proportioned either to the evil which the abuse of power pro-

duces, or to the depravity of a man who, having been entrusted with power for the public benefit, employs that power to gratify his own cupidity, or revenge.

But it is to be remembered that there is a marked distinction between the Penal Clauses contained in this Chapter and the other Penal Clauses of the Code. In general a Penal Clause sets forth the whole punishment which can be inflicted on an offender by any public authority. The penalty of theft, of breach of trust, of cheating, of extortion, of assault, of defamation, has been fixed on the supposition that it is the whole penalty which the criminal is to suffer, and that no power in the State can make any addition to it. But the penalty of an offence committed by a public functionary in the exercise of his public functions has been fixed on the supposition that it will often be only a part, and a small part, of the penalty which he will suffer. It is in the power of the Government to punish him for many acts which the law has not made punishable. It is in the power of the Government to add to any sentence pronounced by the Courts another sentence which will often be even more terrible. To a man whose subsistence is derived from official emoluments, whose habits are formed to official business, and whose whole ambition is fixed on official promotion, degradation to a lower post is a punishment; dismissal from the public service is a punishment sufficient even for a serious offence. The mere knowledge that his character has suffered in the opinion of those superiors on whom his advancement depends probably gives him as much pain as a heavy fine.

This is to a great degree the case in every country, and assuredly not less in India than in any other country. Indeed those servants of the Company by whom all the higher offices in the Indian Government are filled entertain a feeling about their situations very different from that which is found among political men in England. It is natural that they should entertain such a feeling. They are set apart at an early age as persons destined to hold offices in India. Their education is conducted at home with that view. They are transferred when just entering on manhood to the country which they are to govern. They pass the best years of their lives in acquiring knowledge which is most important to men who are to fill high situations in India, but which in any other walk of life would bring little profit and little distinction, in mastering languages which, when they quit this country, are useless to them, in studying a vast and complicated system of revenue which is altogether peculiar to the East, in becoming intimately acquainted with the inter-

ests, the resources, and the projects of potentates whose very existence is unknown even to educated men in Europe. To such a man, dismissal from the service of the Indian Government is generally a very great calamity. His life has been thrown away. It has been passed in acquiring information and experience which, in any pursuit to which he may now betake himself, will be of little or no service to him. There are therefore few covenanted servants of the Company who, even if they were men destitute of all honorable feeling, would not look on dismissal from the service as a most severe punishment. But the covenanted servants of the Company are English gentlemen, that is to say they are persons to whom the ruin of their fortunes is less terrible than the ruin of their characters. There are few of them, we believe, to whom an intimation that their integrity was suspected by the Government would not give more pain than a sentence of six months imprisonment for an offence not of a disgraceful kind, and to many of them death itself would appear less dreadful than ignominious expulsion from the body of which they are members.

Thus dismissal from the public service is a punishment exceedingly dreaded by public functionaries, and most dreaded in this country by the highest class of public functionaries. Nor is this all. It is not merely a severe punishment, but it is also a punishment which is far more likely to be inflicted than many punishments which are less severe. Those who are legally competent to inflict it are bound by no rules, except those which their own discretion may impose on them. For what kind and degree of delinquency they shall inflict it, by what evidence that delinquency shall be established, by what tribunals the enquiry shall be conducted, nay, whether there shall be any delinquency, any evidence, any tribunal, is absolutely in their breasts. They may inflict this punishment, and may be justified in inflicting it for transgressions which are not susceptible of precise definition, and which have not been substantiated by decisive proof. They may be justified in inflicting it because many petty circumstances, each of which separately would be too trivial for notice, have, when taken together, satisfied them that a functionary is unfit for any public employment. They may be justified in inflicting it because they strongly suspect him of guilt which they cannot bring home to him by evidence to which a Zillah Judge would pay any attention. Most of what we have said of the punishment of dismissal from office applies, though not in the same degree, to the slighter punishments of censure, suspension, and removal from a higher to a lower post.

We have shewn that public functionaries are liable not only to the punishments provided by this Code, but also to other peculiar punishments of great severity. It seems therefore to follow that, if those who possess the power of inflicting these peculiar punishments can be trusted, some malpractices of public functionaries may be safely left unnoticed in this Code, and that other malpractices need not be visited with legal punishment so rigorous as their enormity might seem to merit. The Executive Government, in our opinion, deserves to be trusted. At all events it must be trusted. For it is quite certain that no laws will prevent corruption and oppression on the part of the servants of the Indian Government, if that Government is inclined to screen the offenders. The Government, to say nothing of the vast influence which it can indirectly exert, appoints, promotes, and removes Judges at its discretion. It can remit any sentence pronounced by the Courts. It can, therefore, if it be not honestly disposed to correct official abuses, render any penal clauses directed against such abuses almost wholly inoperative. And if it be honestly disposed, as we firmly believe that it is, to correct official abuses, it will use for that purpose its power of rewarding and punishing its servants.

It will be seen that we propose, under Clause 138, to punish with imprisonment for a term not exceeding three years, or with fine, or both, the corruption of public functionaries. The punishment of fine will, we think, be found very efficacious in cases of this description, if the Judges exercise the power given them as they ought to do, and compel the delinquent to deliver up the whole of his ill-gotten wealth.

The mere taking of presents by a public functionary, when it cannot be proved that such presents were corruptly taken, we have made penal only in one particular case to which we shall hereafter call the attention of His Lordship in Council. We have not made the taking of presents by public functionaries generally penal; because, though we think that it is a practice which ought to be carefully watched and often severely punished, we are not satisfied that it is possible to frame any law on the subject which would not be rendered inoperative either by its extreme severity or by its extreme laxity. Absolutely to prohibit all public functionaries from taking presents would be to prohibit a son from contributing to the support of a father, a father from giving a portion with a daughter, a brother from extricating a brother from pecuniary difficulties. No Government would wish to prevent persons intimately connected by blood, by marriage, or by friendship

from rendering services to each other; and no tribunals would enforce a law which should make the rendering of such services a crime. Where no such close connexion exists, the receiving of large presents by a public functionary is generally a very suspicious proceeding. But a lime, a wreath of flowers, a slice of betel nut, a drop of atar of roses poured on his handkerchief, are presents which it would, in this country, be held churlish to refuse, and which cannot possibly corrupt the most mercenary of mankind. Other presents of more value than these may, on account of their peculiar nature, be accepted without affording any ground for suspicion. Luxuries socially consumed according to the usages of hospitality are presents of this description. It would be unreasonable to treat a man in office as a criminal for drinking many rupees worth of Champagne in a year at the table of an acquaintance, though if he were to suffer one of his subordinates to accept even a single rupee in specie, he might deserve exemplary punishment.

It appears to us therefore that the taking of presents where a corrupt motive cannot be proved ought not, in general, to be a crime cognizable by the Courts. Whether in any particular case it ought to be punished or not, will depend on innumerable circumstances which it is impossible accurately to define, on the amount of the present, on the nature of the present, on the relation in which the giver and receiver stand to each other. Suppose that a wealthy English agent who is interested in a young civil servant of the Company were to pay the debts of that civil servant. Or suppose that a Resident were to furnish money to enable his invalid Assistant to proceed to the Cape. In these transactions there might be nothing which the most scrupulous could disapprove. But the case would be widely different, if a wealthy native Zemindar were to pay the debts of a Collector of his District, or if any of the Officers at the Residency were to receive money from the Minister of a foreign power. In such a case, though it might be impossible to prove a corrupt motive, we think that the Government would be inexcusable if it suffered the delinquent to remain in the public service.

We have hitherto put only extreme cases, cases in which it is clear that the taking of presents ought not to be punished, or cases in which it is clear that the taking of presents ought to be severely punished. But between the extremes lie an immense variety of cases, some of which call for severe punishment, some for milder punishment, some for censure, some for gentle admonition, while some ought to be tolerated.

We have said that if a Collector were to accept a large present of money from a wealthy native Zemindar, he would deserve to be turned out of the service. But if the Collector were to accept such a present from an English Indigo Planter, the case would be different. The Indigo Planter might be his uncle, his brother, his father-in-law, his brother-in-law. In that case there might be no impropriety in the transaction. Again, if a native in the public service were to accept a present from a Zemindar who was connected with him by blood, marriage or friendship, there might be no impropriety in the transaction.

By the act of Parliament to which the malpractices of the first British conquerors of India gave occasion, the servants of the Company were forbidden to receive presents from Asiatics, but were left at liberty to receive presents from Europeans. The legislators of that time appear to have proceeded on the supposition that the servants of the Company would all be Englishmen, and that no Englishman would ever have any such connection with any native as would render the receiving of presents from that native unobjectionable. •

Natives are now declared by law to be competent to hold any post in the Company's service. It would evidently be improper to interdict an Asiatic in the service of the Company from receiving pecuniary assistance from his Asiatic father, or from receiving a portion with an Asiatic bride. It seems to us therefore that the rule laid down by Parliament, though it will still be in many cases an excellent rule of evidence, ought not, under the altered circumstances of India, to continue to be a rule of law.

Again: it ought to be remembered that the European and native races are not at present divided from each other by so strong a line of separation, as at the time when the British Parliament laid down the rule which we are considering. The interval is still wide, but it by no means appears to us as it appeared to the legislators of the last generation to be impassable. It is evident therefore that the rule formerly laid down by Parliament is constantly becoming less and less applicable to the state of India. On these grounds we have thought it advisable to leave this matter to the Executive Government, which will doubtless promulgate from time to time such rules as it may deem proper, and will enforce submission to those rules by visiting its disobedient servants with censure, with degradation, or with dismissal from the public service, according to the circumstances of every case.

We have thought it desirable to make one exception. We propose

that a Judge who accepts any valuable thing by way of gift from one whom he knows to be a Plaintiff or a Defendant in any cause pending in his Court shall be severely punished. This rule is not to extend to the taking of food in the interchange of ordinary civilities. It appears to us that the objections which we have made to a general law prohibiting the receipt of presents by public functionaries do not apply to this Clause. The rule is clear and definite. The practice against which it is directed is not a practice which ought sometimes to be encouraged, and sometimes to be tolerated. It ought always, and under all circumstances, to be discouraged. It, therefore, appears to unite all the characteristics which mark out a practice as a fit object of penal legislation.

The only other penal provision of this Chapter to which we think it necessary to call the attention of his Lordship in Council is that which is contained in Clause 149.

We are of opinion that the preceding Clauses, and the power which the Government possesses of suspending, degrading, and dismissing public functionaries will be found sufficient to prevent gross abuses. But there will remain a crowd of petty offences with which it is very difficult to deal, offences which separately are too slight to be brought before the criminal Tribunals, which will sometimes be committed by good public servants, and which therefore it would be inexpedient to punish by removal from office, yet which will be very often committed if they can be committed with impunity, and which, if often committed, would impair the efficiency of all departments of the administration, and would produce infinite vexation to the body of the people.

By the existing laws of all the Presidencies a summary judicial power is given in certain cases to certain official superiors for the purpose of restraining their subordinates. We are inclined to believe that this is a wholesome power, and that it has, in the great majority of cases, been honestly employed for the protection of the public. We propose therefore to adopt the principle, and to make the system uniform through all the provinces of the Empire, and through all the departments of the public service. We propose that a public functionary who is guilty of neglect of duty, who treats his superiors with disrespect, or who disobeys the lawful orders given by them for his guidance, shall be liable to a fine not exceeding the official pay which he receives in three months. In default of payment he will be liable (see Clause 54) to seven days' imprisonment.

In the Code of Procedure we think that it will be proper to provide that the power of awarding this penalty shall be given, not to the ordi-

nary tribunals, but to the official superiors of the offender. Thus if a subordinate officer employed in the collection of revenue should incur this penalty it will be imposed by the Collector, and the appeal will probably be to the Board of Revenue. If an officer employed to execute the process of a Zillah Court should neglect his duty, the fine will be imposed by the Zillah Judge, and the appeal will probably be to the Sudder Court. If the offence should be committed by a Tide Waiter, the Collector of Customs for the port will probably impose the penalty, and the appeal will be to the Board of Customs. These instances we give merely as illustrations of what, at present, appears to us desirable. The details of this part of the law of procedure cannot be arranged without much consideration and enquiry.

One important question still remains to be considered. We are of opinion that we have provided sufficient punishment for the public servant who receives a bribe. But it may be doubted whether we have provided sufficient punishment for the person who offers it. The person who, without any demand express or implied on the part of a public servant, volunteers an offer of a bribe, and induces that public servant to accept it, will be punishable under the general rule contained in Clause 88 as an instigator. But the person who complies with a demand, however signified, on the part of a public servant, cannot be considered as guilty of instigating that public servant to receive a bribe. We do not propose that such a person shall be liable to any punishment, and, as this omission may possibly appear censurable to many persons, we are desirous to explain our reasons.

In all states of society the receiving of a bribe is a bad action, and may properly be made punishable. But whether the giving of a bribe ought or ought not to be punished is a question which does not admit of a short and general answer. There are countries in which the giver of a bribe ought to be more severely punished than the receiver. There are countries, on the other hand, in which the giving of a bribe may be what it is not desirable to visit with any punishment. In a country situated like England, the giver of a bribe is generally far more deserving of punishment than the receiver. The giver is generally the tempter, the receiver is the tempted. The giver is generally rich, powerful, well educated, the receiver needy and ignorant. The giver is under no apprehension of suffering any injury if he refuses to give. It is not by fear, but by ambition that he is generally induced to part with his money. Such a person is a proper subject of punishment. But there are countries



where the case is widely different,—where men give bribes to Magistrates from exactly the same feeling which leads them to give their purses to robbers, or to pay ransom to pirates,—where men give bribes because no man can, without a bribe, obtain common justice. In such countries we think that the giving of bribes is not a proper subject of punishment. It would be as absurd, in such a state of society, to reproach the giver of a bribe with corrupting the virtue of public servants, as it would be to say that the traveller who delivers his money when a pistol is held to his breast corrupts the virtue of the highwayman.

We would by no means be understood to say that India, under the British Government, is in a state answering to this last description. Still we fear it is undeniable that corruption does prevail to a great extent among the lower class of public functionaries, that the power which those functionaries possess renders them formidable to the body of the people, that in the great majority of cases the receiver of the bribe is really the tempter, and that the giver of the bribe is really acting in self defence.

Under these circumstances we are strongly of opinion that it would be unjust and cruel to punish the giving of a bribe, in any case in which it could not be proved that the giver had really by his instigations corrupted the virtue of a public servant who, unless temptation had been put in his way, would have acted uprightly.

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#### “ THE HINDU LAW OF ADOPTION.

*(By Rao Bahadoor Mahadev Govind Ranade, First Class Subordinate Judge at Nassik.)*

We propose to discuss in this paper a point of considerable importance in the Hindu Law of Adoption, upon which, as far as we can see, no final decision has yet been given, and the authorities, such as they are, conflict with one another. The point may be briefly stated in the following words. Is the observance of Homa sacrifice essential to constitute a valid adoption in the Brahmin or rather the Dwija castes in the sense that its omission invalidates a duly made gift and acceptance?

On all points of law, when they arise before the Courts in British India, the question is not so much what the law as laid down in the sacred text-books is, as what has been the way in which these texts have been understood and interpreted by the Courts. There is a difference on this head between written law proper and unwritten law. In the case of the former, judicial decisions do not make the law, they only declare the law. In the case of unwritten law or usage or customary or common law, judicial decisions have in part a legislative function, they both make and declare the law. In the case of written law, oversights and mistakes may be corrected by special legislation,—and there is only one text to be interpreted. In the case of unwritten law, such subsequent correction is often impossible, and the law has to be gathered from various and conflicting texts by a process of reasoning which has been a work of sufficient magnitude to be raised into a technical science by itself. It is very necessary to bear these distinctions in mind. Moreover, Hindu law-texts were written many hundred years ago. It is therefore quite impossible in the nature of things that they can be made to suit all the varying conditions of time, place, and manners.

The only way to escape from this difficulty allowed by the Shastras is through the medium of raising the customs of families, tribes, trades, and countries, into an equal importance with the law-texts, and thus controlling the rigid action of the latter. All the Smriti-texts recognize this superior power of customary law. It is in reference to these requirements that Mr. Justice Holloway in 2 Madras High Court Reports, P. 227 observes that, "a wise because just policy has secured to the Hindus their own laws of inheritance, but this would become a boon of very questionable value, if the law is to remain narrowed to the positive dogmas collectable from the text-writers, and if its principles are not to receive that interpretation which must necessarily have followed from an unchecked development proceeding from the nature and origin of these principles. Looking at the reason for a positive rule of law, the proper principle of interpretation is to bring within the rule everything which is manifestly within the reason of it. This rule of interpretation is narrowed in its application to statutes, the true reason of the remedy is such reason as is collectable from the words of the statute. But the principle is properly and necessarily applied to judiciary law. The works of text-writers far more nearly resemble judicial decisions than statutes. On this principle the authorities as to the nature of the assent of kinsmen to adoption must be dealt with, and should the authorities be inconsistent with the reason of the rule,—they must be overruled, or their omissions should be supplied."

This was said with reference to one disputed question regarding the law of adoption, but it has a wider application. In another case, the Collector of Madras *vs.* Ramlinga Shatputy, the Privy Council laid down that "that the duty of a European judge (and for the same reason of Subordinate native judges) in administering Hindu law is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district whence the case comes and, what appears to us to be of far more consequence, whether it has been sanctioned by usage. Clear proof of usage will outweigh the written texts." It follows from the general considerations suggested before, and from the decisions of the Judges quoted at length, that in deciding questions of Hindu law, judicial decisions must be first consulted. If the decisions are not clear nor binding, the next authority is custom. If there is no evidence of custom one way or the other, the dicta of the particular school, which obtains in the district whence the

case comes, ought to govern, and lastly, the law-texts generally. We have deemed it necessary to lay down this order of priority because, at times, it is tried to make out that it was the duty of the judges, especially native judges, to accept the interpretation of the texts as found in the old law-books, and to give effect to it in the same unreserved manner with which the text of the statute law is followed. If these texts had the efficacy of written law, it would have been our duty to give such effect, but the principle of interpreting what in essence and effect is customary or unwritten law is entirely different, and the order of priority laid down above must be followed.

We shall proceed now to discuss the question whether sacrifice or Homa is essential to the validity of adoption in the sense that the absence of it invalidates adoption. Looking first to the judicial decisions, there is one remark to be made in this place, namely, that the law of adoption as interpreted in Southern, and especially in Western India, is much more liberal in all respects, i. e., is less restrained by forms and restrictions, than the law of Mithila and Bengal. In carefully systematizing the decisions of the various High Courts on the question of what constitutes the essence of Hindu adoptions, it is very necessary to bear this consideration in mind. It will be also necessary to bear in mind that the cases make a very important distinction between Sagotra adoption, especially the adoption of a nephew, and the adoption of strangers of a different gotra. We shall first cite the Bombay cases on the point.

(1) The first Bombay case is reported in 2 Borrdaile, P 75. In this case it was held that the adoption of a nephew by his uncle is legal, if performed by word of mouth alone. The decision in this case was passed upon a Vyavastha of the Shastri to the effect that the performance of burnt sacrifice and other ceremonies in the adoption of a brother's son is not expressly demanded. The Shastri referred to Yama Smruti as his authority; the text quoted is—"Burnt sacrifice is not enjoined at the adoption of a daughter's\* or brother's son. The adoption is completed by word of mouth alone. Whereupon on the point of death, a brother's son may be adopted as a son either with or without a burnt sacrifice." We have not been able to trace this text in the copy of the Yama Smruti in our possession.

(2) The Shastri's Vyavastha, however must have some valid foundation, because in Steele's Collections of Caste and Customs law, it is

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\* The adoption of daughter's son and sister's son is permitted among the Sudras only. See West and Buhler's Hindu Law, 148 (2nd Ed.) Str. Hindu Law, 83 (4th Ed.).

mentioned that Homa or fire-sacrifice is not necessary in the adoption of a brother's or daughter's son or younger brother, which are performed by Vukdan or verbal gift. There is a reference to Bhalchundra Shastri, and to the case reported before from 2 Bor., P. 75.

(3) There are two cases in the Sadar Diwani Adalat reports to the same effect. The first case *Abaji Dinkar vs Gungadhar Wasudeo* is reported in 3 Morris, part 6, P. 420. Among many other points which were decided in this case, namely, that a widow may adopt without her husband's consent an eldest and only son of the giver without the sanction of the ruling power, the question of the necessity of ceremonies and of the fire-sacrifice was also raised and decided in the negative. The judge of the District Court Mr. Remington, whom the present Chief Justice has favourably noticed in his judgment in the Khandesh case, remarked that "with respect to the usual ceremonies performed, all that is required to make adoption valid is the giving, and the taking, and the witnesses state this took place."

Mr. Frere in appeal confirmed this decree, holding that, though an adoption with the sanction of Government and in the presence of relations and friends and accompanied with religious rites, is the best adoption, still one, in which the gift of the child and the acceptance of the child is manifested by an act, is a good adoption. Mr. Harrison, the other Sadar Judge, slightly differed from this view, and held that in a case of exigency, such as the dying moments of a person may present,—he can adopt a son without any forms save the giving and receiving. Such person may be qualified to perform his funeral obsequies. As to succession, his filial rights would not be established. Ceremonies ensure publicity which the interests of society demand."

The decision was passed in accordance with the view of Mr. Frere.

(4) In another case reported in the same volume, the adoption was upheld though it was found that the rite was unattended with all the publicity and ceremony usual, on the ground chiefly that the natural father had given his consent to the gift. Both these cases related to Brahmins, and the person adopted was a Sagotra member of the family.

(5) In S. A. 185. *Jaganath bin Ramkrishna re. Radhabai*, the claim was to recover certain property by right of inheritance as an adopted son. The claim was thrown out by both the lower Courts on the ground that Datta Homa was not performed. In special appeal, the High Court (Newton and Warden, J. J.) held that "the ceremony

of sacrifice to fire was not essential to the validity of adoption." This case was decided on the 22nd of August 1865.

Taking all these cases together, they form a connected and consistent chain of judicial decisions commencing from the introduction of British rule in this country, and coming down to our own times.

(6) In the case of *Keshawa Kome Dhondlingappa vs. Ningappa Manappa*, S. A. 645 of 1866 (Warden and Gibbs, J. J.) the Court held — that as the parties were not Brahmins, proof of giving and receiving in adoption was enough.

The implication suggested by the qualification in this case loses all its force when it is placed side by side with the authorities quoted before. We may therefore conclude that the current of judicial decisions is altogether in favour of the view that when gift and acceptance are manifested by overt act, the observance of ceremonies and the performance of the sacrifice are not essential in the sense that their omission invalidates an adoption.

(7) Passing over to the decisions of the other High Courts, there is first the decision of the Privy Council in a case on appeal before them from the Madras Presidency reported in 2 Knapp, page 294, where their Lordships incidentally observed that "neither written acknowledgments nor the performance of religious ceremonies were essential to the validity of an adoption."

(8) A later decision of the Madras High Court has placed this point beyond dispute so far as the law of that Presidency is concerned. It was held in this case, reported in 4 Madras High Court Reports, 165, that the proof of the performance of ceremonies was not essential to the establishment of a valid Brahmin adoption.

(9) In this case two early cases decided by the elder Strange were cited in which it was held that "obligation to fire is not essential to the validity of adoption. The operative part of the ceremony seems to be the gift and the acceptance, the rest is matter of customary solemnity, of decorum, of charity, and conviviality, varying under different circumstances in different parts of India, or at least in the idea of different Pandits and Shastris but one opinion is common to all, that nothing of this kind is so essential to the act as being mistaken or omitted can have the effect of invalidating adoption." There must be giving and receiving, manifested by an overt act, beyond this nothing is absolutely necessary. Invitation to the Raja and to the kinsmen is merely intended to secure greater solemnity to the thing, so as to obviate all doubts regarding suc-

cession. And even with regard to the sacrifice of fire, important as it may be deemed in a spiritual point of view, it is so for Brahmins only, for they alone can recite the texts; and even with regard to them, it is not essential to the efficacy of the rite for civil purposes."

(10) In this decision of the elder Strange, Mr. Colebrooke and Mr. Ellis both agree, though the younger Strange and Mr. Macnaghten have held an adverse view. The Madras High Court in the case quoted before combated the views of these latter authorities, and overruled the text-writers and with them the dicta contained in the texts.

(11) So far therefore as the law of Western and Southern India is concerned, the authorities are clearly in favour of upholding the validity of an adoption when gift and acceptance are clearly established, although no sacrifice to fire or other ceremonies were performed. Turning to the law of Bengal, it must be at once conceded that the authorities there have been inclined to take an opposite view. In one case reported in 4 Bengal Law Reports, 162 (A. C. J.) the Judges Bayley and Loch commented upon the decision of the Madras High Court quoted before, and held that even in the case of Sudras, ceremonies similar to those observed in the case of Brahmins were required for a valid adoption, and that proof of mere giving and taking was not enough. The decision in the case was expressly rested by one of the Judges (Loch) on Babu Shama Charn Sircar's Vyavastha, and he held that the Madras cases did not apply to Bengal. Loch, J., stated that "the filial relation is made by gift, receipt, and by burnt sacrifice; if either is omitted, the relation is not established." In a latter case, however, the same High Court deemed it necessary to qualify their previous ruling. It was held (16 W. R., P. 179) (1) that the performance of Putreshti yag was essential for the validity of adoption, at least in the first three castes. An early decision of the same Court had held before that in the case of Sudras, no religious ceremony is required except in marriage celebrations. The case quoted before was commented upon and distinguished by Bayley, J., in 15 W. R., P. 300. (2); in which he held that "ceremonies necessary in the superior castes were not necessary among Sudras. Moreover, when the adopted son is a member of the family, the mere giving and taking may be sufficient to give validity to the adoption." There are, moreover, some decisions of that Court which show that even in its estimation there is a recognizable distinction between the comparative efficacy of a gift and receipt and of the sacrifice to fire, that proof of the former can under no circumstances be dispensed with, while proof

of the latter may be dispensed with on occasions. In a case reported in 16 W. R., P. 361, it was held that "where there has been satisfactory evidence showing that a party has been given and received in adoption, and when the adoption has been continually recognized for a series of years, and the party adopted is shown to have held possession either in person or through his guardian, in such case, after the lapse of twenty years, the court may very well dispense with the proof of the performance of ceremonies."

It is obvious from this ruling that the two ingredient deemed essential in Bengal to make adoption valid are not deemed to be equally necessary on this side of India. The same difference is recognized [18 W. R., P. 77] (3) in a later case decided by the same court, in which it was held that "when the factum of adoption was admitted, or at all events not questioned, and the status of the adopted son had been recognized by the family for a series of years, and the adopted son died in possession of his adopting father's property, and performed his Shradha, the strongest presumption arose in favour of the validity of the adoption, and that the *onus* was on them who questioned the adoption to prove that the necessary ceremonies were omitted or not performed." At any rate, it is clear that though the Bengal High Court recognizes the necessity of a sacrifice and of ceremony generally, especially for Brahmin adoptions, at the same time, it does make a distinction, and a very material one, between the relative importance of the two ingredients. Proof of gift and acceptance can never be dispensed with; under special circumstances, proof of the performance of ceremonies may be dispensed with.

(12) Although there is thus a conflict of decisions between the High Courts, it is not an open question which set of decisions are binding on courts on this side of India. However, owing to the great deference that is justly due to their Lordships who preside over the Calcutta High Court, and more especially to the Honorable Mr. Justice Dwarkanath Mittra, it may not be out of place to state more precisely the reasons why the Bengal decisions furnish no safe guide on this side of India. On all the disputed points of the law of adoption, the decisions on the Bengal side are directly opposed to what is recognized to be the law in Western and Southern India. On the Bengal side, an

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(1) Luchman Lall v. Mohun Lall Bhoya Gayal and another. (2) Nittysaund Ghose v. Kishen Dyal Ghose. (3) Chowdhry Heerasutalsh v. Brojo Soonder Roy and others.



only son, *ipso facto* an eldest son, cannot be adopted. (10 W. R., Page 34 ; 1 Bengal Law Reports, Page 221, and 13 Moore I. A., Page 85.) (4). On the Bengal side, it has been held that there are other ceremonies performed by Brahmins among people of Shudra Caste essential to the validity of adoption besides the giving and taking. On the Bengal side, the husband's positive authority to his wife or widow to adopt a son to him has to be strictly proved. (*Hardhan Muckerjee v Muthuronath Muckerjee*, 7 W. R., P. 71 ; 8 Moore I. A., P. 477). On every one of these points, the schools of Western and Southern India hold doctrines directly opposed to those of the Bengal School. On this side of India (3 Morris, P. 425) (5) an only son, an eldest son, and if a member of the same family, even a son married, and who is the father of many children, may be adopted, and no ceremonies whatever besides formal giving and taking are necessary in the case of Sudra adoptions. (4 Bom. H. C. R., P. 26 and 67). And lastly, a widow can adopt without her husband's authority, unless the husband has positively prohibited her so doing, and she can adopt without the consent of kinsmen, if the act is done *bona fide* in performance of duty and not capriciously, and it does not deprive any party of rights which have vested in him.

The Madras decisions on all these points are nearly as liberal as those on this side of India. The adoption of an eldest son, or of an only son is valid (1 Madras H. C. R., Page 54). (6) A Hindu widow may adopt a son without the consent of her husband (2 Madras High Court Reports, Page 206 ; (7). The Bengal School, as also to some extent the Benares School, being so directly in conflict with the Schools of Western and Southern India on all the more disputed questions of the law of adoption, it is plain that, even if the question at present before us were open, it would have been the duty of the Court to decide it in accordance with the more liberal principles of the schools which prevail in Western and Southern India.

The fact is, these latter schools recognize a distinction between the religious and the civil efficacy of adoption. This distinction has already been clearly recognized in the quotation made before from the Judgment of the Madras High Court. This distinction the Honorable Mr. Justice Dwarkanath Mitra has explicitly ignored, as having no

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(4) *Rajah Opendir Lall Roy v. Ranee Brom Moyee*.

(5) *Abaji Dinker v. Gungadhur Vasudeo Gosavee*.

(6) *Chuma Gauridam v. Kumara Gauridhen*.

(7) *Collector of Madura v. Shrimattee Muller Vijaya*.

applicability to Hindu law, in his judgment reported in 10 Weekly Reporter, Page 347, where it was held that the adoption of an only son was invalid. To quote from his judgment, "Adoption is a religious institution, but it is an act of such a kind that its religious and temporal aspects are inseparable. All distinction between religious and legal injunctions must be necessarily inapplicable in Hindu law. The adoption of an only son is as invalid as the adoption by a childless widow without her husband's consent. The prohibition applies to both, and the punishment is extinction of lineage. It is true that the doctrine of *factum valet* is to a certain extent recognized by the Bengal School. But if we were to extend the doctrine to the law of adoption, every adoption would be valid, however grossly the injunctions of the Hindu law may have been violated." With great deference to the authority of the learned judge whose dictum has been quoted before, we think that the function and duties of the judges who preside over our civil courts have been only partially realized in the principles above laid down. If the texts of Hindu law are to be so rigidly interpreted in these days, the question naturally arises, how came the doctrine of *factum valet* to be recognized so extensively in all the schools of law? This doctrine of *factum valet* is in one sense a fiction.—a very useful fiction, if the necessity which obliged the text-writers to invent it be properly recognized. If that necessity was felt in such force in times past when Hindu society was not amenable to any alien influences, it would be passing strange if it were ignored now, when so many influences are acting upon it in all directions. As we understand it the doctrine of *factum valet*, as well as the convenient shelter afforded by the sanction of local or tribal custom, and the power allowed by the text-writers to the king's ordinances to make and unmake the law, owed their origin to the fact which was clearly perceived by the Smruti writers and the commentators, that the rules of law as laid down in the early text-books were too rigid and narrow, too full of forms, too much wanting in breadth, to be safely applied in their naked shape to the transactions of life, at least in these latter days. Society was out-growing the rules, and the rules, therefore, had to be rationalized and adapted to the Society. The transformation which the early Roman law underwent in the hands of the Equity-Praetors, and the slow revolution by which the arrogation of the old Roman Law was developed into the law of adoption as laid down in the Justinian Code, has repeated itself, in India, and the fact must be recognized and acted upon. Under the additional stimuli act-

ing at present upon society, it can do no good to shut one's eyes to the considerations which were found so potent by the text-writers themselves. To a greater or less extent, all the different schools have recognized the necessity of this process of gradually unfettering the law, removing its formal restrictions, and recognizing more freely the spirit of civil acts as constituting the essence of the rules of the Shashtra to the displacement of the ceremonial and ritual part of it. What could be more opposed to the original conception of the rite of adoption than the fact that, on this side of India, a man with his wife and children at a very advanced time of life may be adopted by a sagotra, yet, looking to the spirit of the act of filiation, there appears to be nothing very grossly violent about the process. To sum up what has been said before it appears to us that the views expounded by the Honourable Mr. Justice Dwarkanath Mittra are not supported by the analogy of the principles recognized by the old text-writers and their commentators, old and new, who have given rise to the various schools, nor by the analogy of the process of transformation observed in other systems of law. And they certainly have no application on this side of India, where a distinction has been clearly recognized between the religious and the civil efficacy of the rite of adoption. The performance of sacrifice may be allowed to have a religious efficacy, but its omission, when there is no dispute about the gift and the acceptance cannot in any way invalidate an adoption duly made and ratified.

It becomes wholly unnecessary in the view we have taken of the question to refer to the text-writers, for these occupy in the order of precedence only a subordinate place. As the question has been concluded by the decision quoted before, it is unnecessary to refer to the texts which lay down the essentials of the rite of adoption. It must be at once conceded that the texts in all the reputed books of authority require definitely the performance of the sacrifice to fire to confer validity upon an adoption. Mayukha, Dattaka Chandrika, and Dattaka Mimansa are all equally positive and express on this point. Even these works however recognize the superior force of custom in these matters. In the case of a sagotra and sapinda adoption, for instance, Dharm Sindoo lays down "that in some countries, adoption is completed without any Vedic rite by the simple agreement of the giver and receiver, and the sanction of the ruling power accompanied by nonvedic forms and the performance of moonj and marriage by the adopting father." The text from Yama Smruti quoted before also favours this view. It is clear from this

that there is a difference recognized, or at least one which is not inconsistent with the spirit of the texts, between the adoption of a Sago-tra, and the adoption of a stranger, and the performance of sacrificial rites is not of such account in the one case as in the other.

The same inference is suggested by the fact that the sacrifice to fire is described in the ritual as an *अंगदत्त* act, a subordinate part of the main rite, which is *दानप्रतिग्रह*, i. e., gift and acceptance. The sacrifice, it is to be remembered, is not performed directly by the adopting father, it is performed by the priest, the adopting father and the child sit near and say some mystic words, while the formal gift and acceptance cannot be so deputed. Moreover, it is worth noting that the ritual of sacrifice to fire prescribed in the case of adoption proper is identically the same with that which is prescribed in the three or four other varieties of filiation recognized by the old law, and which have now gone out of use. These are all important indications of the comparative unimportance of the sacrifice to the completion of the rite of adoption. The texts, moreover, from Show-naka as well as from Vashista, translated literally mention the necessity of the rite in the same breath with many other requisites. The grammatical construction of the passage in Shownaka is suggestive of no special prominence accorded to it over the other rites. "After having fasted on the previous day, and having procured clothes and ornaments and rings and umbrella, and invited a learned Brahmin to the Acharya with sacred grass and samidha, and called kinsmen and friends, and sent intimation to the king, the adopting father should, calling God to mind, express by word of mouth his resolution to adopt a son for the sake of securing God's love and his own emancipation from hellfire which is the lot of childless men. After having performed all the preliminary rites, and invoked the blessings of the Gods, and deceased ancestors, and of the Brahmins, and feasted them, the priest should express his resolution to perform the Homa sacrifice. He should bring fire, consecrate the ground, and set the fire ablaze. He should take 28 handfuls of rice and ghee, and after pouring on the rice duly consecrated water, put it in the vessel, and place the vessel on the fire. After that the adopting father should go to the house of the natural father, and himself beg the gift of the child. The natural father should then, after duly calling God to mind, express his resolution for the sake of God's love, to give his son in gift, and should worship the receiver. He should recite the Vedic texts, and at the end should say that he gave away his son to the receiver in adoption and that the boy ceased to be his son any

longer. So saying he should pour water on the acceptor's hand. The taker should in his turn recite some texts, and take the boy on his lap, and smell his head, and give him clothes and ornaments, and should bring him to his house with music and with pomp accompanied. After bringing the boy home the adopting father should finish the sacrifice to fire, he should sit before the fire with his wife, make the boy sit on her lap, and the Acharya should finish the sacrifice. He (Acharya) should throw in the fire the handfuls of rice and ghee, saying all the while the usual Vedic texts. The adopting father should say as each handful was thrown into the fire, "This is to you oh Agni! this is to you oh! Surya Savitri see, this is not mine." Having thus finished the sacrifice, the adopting father should bestow gifts to Brahmins, and call God to mind, and invoke his love at the conclusion of the rite."

This is in short the substance of Shownaka's text. We have had the Vedict mantras usually recited on these occasions translated to see what they imported to be. Like all other similar texts used in these ritual observances, these Vedic texts have no proper application to the occasion. Sacrifice to fire is thus purely a religious accompaniment to the civil agreement manifested by the formal overt gift and acceptance, and is on a par with the formal interrogations and stipulations, and the striking of the balance of the old Roman law, when persons *non sui juris* were emancipated, or an arrogation took place from one gens into another. It can have in itself no more efficacy than the equally requisite conditions of calling in the kinsmen, and informing the King. Yet both these conditions may be dispensed with by the law as it is now understood, and their absence does not vitiate the adoptions. For the same, or rather for the additional reason that the sacrifice is only a religious accompaniment, its omission, however much it might detract from the virtue of the act on religious grounds, cannot affect the civil efficacy of the gift and the acceptance.

### OF PRISONERS.

It is a curious principle in our law that prisoners charged with having committed a crime, are the only people in the world presumed to be innocent of it. But this great advantage is not conceded to them for nothing; since they are also supposed to speak falsely when they deny that they are guilty of the very offence which they are presumed not to have committed; and, therefore, if they should desire to assert their innocence under the sanction of an oath, this is forbidden, because they are further presumed to be addicted to perjury.

The truth is, that, although the law pays a prisoner the compliment of supposing him to be wrongly accused, it, nevertheless, knows very well that the probabilities are in favour of the prosecutor's accusation being well founded, and does not mean in any way to insinuate that he brings a false charge—it follows, therefore, that the presumably righteous are regarded with the greatest suspicion, and herein our law shows, perhaps, more of practical wisdom than of logic.

Every one knows that, if there be a reasonable doubt whether a prisoner be guilty or not, he must be acquitted, whereas no such concession is made to a defendant in a civil action. It might well then be imagined that more verdicts would be gained by prisoners than by defendants; but they who think thus have failed to notice that it is more important to a man to look innocent than to be *prima facie* thought so. No defendant is brought up through a hole in the floor; he is not surrounded by a barrier; nor guarded by a keeper of thieves; he is not made to stand up alone while his actions are being judged; and his latest address is not presumably the gaol of his county. In short, it is known that a defendant appears voluntarily, while no one doubts that a prisoner would run away if he could.

It seems, then, to me that to profess to think all accused persons innocent can amount to no more than our attempt to make believe that monarchs are all "most gracious," and mayors of little boroughs "worshipful." I might further instance the term "reverend," which, as applied to all clergymen, has been lately declared to be a "laudatory epithet"—a fair description enough of the word "innocent" as predicated of all indicted prisoners.

Another instance of the favour with which the law professes to regard a prisoner on trial may be found in the care taken to ascertain his motives, upon which, and not upon his acts, his guilt or innocence depends.

Thus, if I give a shilling to a beggar, I am at once called a charitable man; yet I have, perhaps, bestowed it upon him well knowing that he will buy poison, and so kill himself. No one, however, considers my motive; the action satisfies all. But, if I should take a shilling away from another, I am not instantly condemned as a thief; for it may be I thought it my own; or, perchance, I was mad—as to shillings. Here my motives are separated, questioned, reviewed, and considered; and if, among all my reasons for acquiring property, I acted upon one not "felonious"—whatever that may mean—I am acquitted; for "*non est reus nisi mens sit rea*."

Now all this process is gone through, not because there is any real difficulty in deciding, but simply because we are going to award punishment in the one case, and do not intend to bestow any reward—or anything more valuable than approbation—in the other. Our law is, in fact, a scheme for afflicting not all offenders, but the most conspicuous; and the length of a case will generally be found to be proportioned, not to the intricacy of the inquiry, but to the magnitude of the sentence in which it is expected to result.

For my own part, I will not venture to consider whether or not too much attention is paid to the motives of men when we are about to

judge of their deserts; but it is certain that many influential teachers of mankind have, looking to results only, estimated motives at nothing whatever. I do not know a better example of this than the doctrines of that Gnostic sect who call themselves *Cainites*. These people, it is said, not only worshipped the first murderer—upon the hypothesis that he must have been virtuous because he was oppressed—but they also adored Judas Iscariot, for the reason that had it not been for his perfidy there would have been no salvation for Christians.

It is said by some jurists that our law looks upon an action as a fair fight between a plaintiff and a defendant, to be conducted, not, indeed, with scrupulous fairness, but according to the rules of the forensic arena. And certain it is—as you may read in Glanvil, if you will—that both a defendant and a prisoner might at one time elect to prove his right to land in the one case, or his innocence of a crime in the other, by knocking on the head, *coram judice*, any one having the temerity to come forward as plaintiff or accuser. But, while allowing this to have been so in the days of Henry II., we must remark that the position of a prisoner now differs from a defendant's, in this, that he is looked upon as having declared war against the State, and so must combat all society at once. His only chance now lies in his heels. He flies therefore before the multitude he cannot hope to withstand; and thus we have a *prosecutor*, who comes, not in the place of the fighting plaintiff, but rather resembles those who give information of the whereabouts of some recognised beast of chase—a man soon passed by and forgotten when once the hunt is up.

But, if an accused person is regarded as a subject of vengence, liable to be caught and killed at prescribed seasons—assizes, or sessions—he is also on that very account entitled to certain *law*, or privileges. Thus the prosecuting counsel is expected to pursue his prey not too viciously, not taking advantage of every weapon he might use—as one does not follow a fox with guns and javelins, nor impede his flight by snares and pit-falls. He who would cross-examine a witness to character is as one who should harpoon hares, or kill salmon with a torpedo.

That a prisoner's wife may not be called, even by himself, is a beneficent provision designed by his enemies to save him from his friends.

The great gain of the prisoner in having all the community for his foe, in place of the one man he has injured, consists in the diffusion, and consequent weakening of enmity, which is its inevitable result. As Izaak Walton while impaling a frog would use him as though he loved him, so do our Courts manipulate a criminal. He is allowed to confess, if it please him; but he is no more driven to this form of suicide than a stag is purposely chased over a precipice; and, indeed, he is often gently dissuaded from admitting his guilt, and encouraged to run for his life or his liberty.

If I have taken some trouble, and given more, in order to explain the theory of our law concerning the advantageous position of the accused when in the dock, I shall, I trust, be excused on account of the general interest of the subject; for we know not where we may be to-morrow, and, perchance, "*de te fabula narratur*."

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GOVINDA ROW'S DIGEST OF INDIAN LAW REPORTS.

The exertions of Mr. S. M. Govinda Row, Pleader, Tanjore, in bringing out annually his Digest of the Complete Series of the Indian Law Reports, are certainly laudable. We have been favored with the first two Volumes and we understand that the third is in preparation and will come out in due time. The Volumes are very cheap. The price of the first is one Rupee and two annas and that of the second is one Rupee and six annas only. The author seems to have taken considerable pains in compiling and arranging the subjects under proper headings. The plan followed is excellent. We can confidently recommend these to our readers. They may be had in our office for cash.

## PUNCHAYET KARJYABIDHI.

We beg to acknowledge with thanks the receipt of a Bengali law book entitled *Punchayet Karjyabidhi*, and edited by Baboo Baroda Doss Bose, Sub-Deputy Magistrate of Nurrail. It contains Bengal Acts VI. of 1870 and I. of 1871 with copious Notes and an Index. It will be highly useful to those concerned in the working of those Acts. Price annas eight only.









